

3 8077 1001 9220 6

C.O.S. Library

**For Reference**

**Not to be taken from this room**



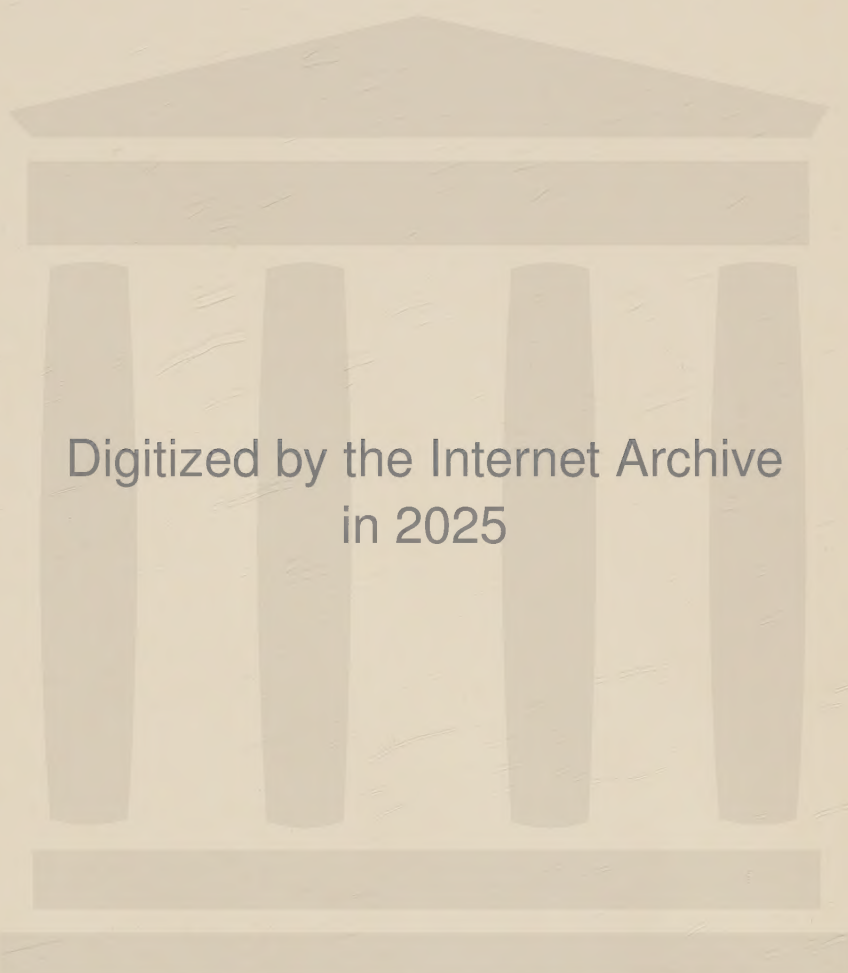












Digitized by the Internet Archive  
in 2025

[https://archive.org/details/bwb\\_S0-AUG-442](https://archive.org/details/bwb_S0-AUG-442)









NATIONAL REPORTER SYSTEM—UNITED STATES SERIES

THE  
SUPREME COURT REPORTER

VOLUME 40

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1919

WITH KEY-NUMBER ANNOTATIONS

NOVEMBER, 1919 — JULY, 1920

ST. PAUL  
WEST PUBLISHING CO.  
1921

COLLEGE OF THE SEQUOIAS  
LIBRARY



COPYRIGHT, 1919  
BY  
WEST PUBLISHING COMPANY

---

COPYRIGHT, 1920  
BY  
WEST PUBLISHING COMPANY

---

COPYRIGHT, 1921  
BY  
WEST PUBLISHING COMPANY

THE CORRESPONDING PAGES OF THE OFFICIAL U. S. REPORTS ARE INDICATED  
IN THIS VOLUME BY CITATION OVER EACH TITLE, SUPPLEMENTED BY STAR PAGING.

(40 SUP.CT.)

JUSTICES  
OF THE  
UNITED STATES SUPREME COURT

---

OCTOBER TERM, 1919

---

CHIEF JUSTICE:

HON. EDWARD D. WHITE.

ASSOCIATES:

HON. JOSEPH McKENNA.

HON. OLIVER WENDELL HOLMES.

HON. WILLIAM R. DAY.

HON. WILLIS VAN DEVANTER.

HON. MAHLON PITNEY.

HON. JAMES C. McREYNOLDS.

HON. LOUIS D. BRANDEIS.

HON. JOHN H. CLARKE.

ATTORNEY GENERAL:

HON. A. MITCHELL PALMER.

SOLICITOR GENERAL:

HON. ALEX. C. KING.<sup>1</sup>

HON. WILLIAM L. FRIERSON.<sup>2</sup>

<sup>1</sup> Appointed November 21, 1918.

<sup>2</sup> Appointed June 1, 1920.

ALLOTMENT OF THE JUSTICES  
OF THE  
SUPREME COURT OF THE UNITED STATES

---

FIRST CIRCUIT.

*Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.*

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

*Comprising Connecticut, New York, and Vermont.*

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

*Comprising Delaware, New Jersey, and Pennsylvania.*

JUSTICE MAHLON PITNEY, of New Jersey. Appointed March 13, 1912, by President Taft.

FOURTH CIRCUIT.

*Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.*

JUSTICE EDWARD D. WHITE, of Louisiana. Appointed February 19, 1894, by President Cleveland; appointed Chief Justice December 12, 1910, by President Taft.

FIFTH CIRCUIT.

*Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.*

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SIXTH CIRCUIT.

*Comprising Kentucky, Michigan, Ohio, and Tennessee.*

JUSTICE WILLIAM R. DAY, of Ohio. Appointed February 25, 1903, by President Roosevelt.

SEVENTH CIRCUIT.

*Comprising Illinois, Indiana, and Wisconsin.*

JUSTICE JOHN H. CLARKE, of Ohio. Appointed July 24, 1916, by President Wilson.

EIGHTH CIRCUIT.

*Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.*

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

*Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.*

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

# Supreme Court Reporter References

## for cases reported in

# United States Reports

### VOL. 250, UNITED STATES REPORTS

| U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep.  | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. |
|---------------|----------------|---------------|-----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|
| Pg.           | Vol.           | Pg.           | Vol.            | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           |
| 1             | 39             | 399           | 153             | 39            | 440            | 328           | 39             | 464           | 549            | 40            | 33             | 639           | 39             |
| 2             | 39             | 431           | 163             | 39            | 507            | 332           | 39             | 474           | 556            | 40            | 24             | 639           | 39             |
| 14            | 39             | 397           | 183             | 39            | 512            | 336           | 39             | 496           | 566            | 40            | 36             | 640           | 39             |
| 22            | 39             | 420           | 191             | 39            | 511            | 355           | 39             | 544           | 573            | 40            | 43             | 640           | 39             |
| 28            | 39             | 401           | 195             | 39            | 511            | 360           | 39             | 512           | 577            | 40            | 27             | 641           | 39             |
| 80            | 39             | 414           | 199             | 39            | 445            | 363           | 39             | 513           | 583            | 40            | 28             | 642           | 39             |
| 83            | 39             | 415           | 207             | 39            | 447            | 368           | 39             | 531           | 590            | 40            | 31             | 642           | 39             |
| 39            | 39             | 422           | 208             | 39            | 486            | 376           | 39             | 524           | 596            | 40            | 44             | 643           | 39             |
| 46            | 39             | 393           | 220             | 39            | 449            | 383           | 39             | 542           | 603            | 40            | 22             | 643           | 39             |
| 58            | 39             | 417           | 22 <sup>a</sup> | 39            | 472            | 387           | 39             | 546           | 607            | 40            | 38             | 644           | 39             |
| 66            | 39             | 405           | 229             | 39            | 458            | 394           | 39             | 526           | 616            | 40            | 17             | 645           | 39             |
| 71            | 39             | 424           | 235             | 39            | 442            | 400           | 39             | 553           | 633            | 39            | 490            | 646           | 39             |
| 76            | 39             | 435           | 241             | 39            | 450            | 454           | 39             | 528           | 634            | 39            | 490            | 646           | 39             |
| 85            | 39             | 402           | 246             | 39            | 460            | 459           | 39             | 522           | 634            | 39            | 491            | 647           | 39             |
| 88            | 39             | 426           | 256             | 39            | 454            | 465           | 39             | 519           | 635            | 39            | 491            | 647           | 39             |
| 94            | 39             | 428           | 269             | 39            | 452            | 473           | 39             | 540           | 635            | 39            | 493            | 648           | 39             |
| 101           | 39             | 396           | 273             | 39            | 463            | 478           | 39             | 517           | 636            | 39            | 490            | 648           | 39             |
| 104           | 39             | 409           | 283             | 39            | 483            | 483           | 39             | 533           | 636            | 39            | 492            | 649           | 39             |
| 111           | 39             | 399           | 290             | 39            | 448            | 501           | 39             | 516           | 637            | 39            | 490            | 650           | 40             |
| 114           | 39             | 411           | 295             | 39            | 483            | 504           | 39             | 549           | 637            | 39            | 493            | 650           | 40             |
| 118           | 39             | 403           | 300             | 39            | 465            | 519           | 40             | 1             | 637            | 39            | 494            | 651           | 40             |
| 123           | 39             | 407           | 308             | 39            | 478            | 525           | 40             | 2             | 638            | 39            | 494            | 651           | 40             |
| 130           | 39             | 412           | 321             | 39            | 476            | 545           | 40             | 42            | 638            | 39            | 495            | 651           | 40             |
| 135           | 39             | 502           |                 |               |                |               |                |               |                |               |                | 53            | 655            |

### VOL. 251, UNITED STATES REPORTS

| U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. |
|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|
| Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           |
| 1             | 40             | 47            | 134            | 40            | 96             | 317           | 40             | 160           | 516            | 40            | 250            | 543           | 40             |
| 15            | 40             | 50            | 146            | 40            | 106            | 326           | 40             | 162           | 519            | 40            | 233            | 543           | 40             |
| 22            | 40             | 79            | 169            | 40            | 102            | 342           | 40             | 155           | 524            | 40            | 247            | 544           | 40             |
| 27            | 40             | 69            | 173            | 40            | 104            | 355           | 40             | 168           | 532            | 40            | 804            | 545           | 40             |
| 32            | 40             | 76            | 179            | 40            | 116            | 366           | 40             | 174           | 535            | 40            | 55             | 545           | 40             |
| 41            | 40             | 75            | 182            | 40            | 113            | 373           | 40             | 172           | 536            | 40            | 55             | 546           | 40             |
| 48            | 40             | 66            | 192            | 40            | 123            | 380           | 40             | 176           | 536            | 40            | 56             | 546           | 40             |
| 54            | 40             | 68            | 198            | 40            | 120            | 382           | 40             | 181           | 537            | 40            | 55             | 546           | 40             |
| 57            | 40             | 62            | 210            | 40            | 139            | 385           | 40             | 182           | 538            | 40            | 55             | 547           | 40             |
| 63            | 40             | 71            | 221            | 40            | 127            | 393           | 40             | 185           | 538            | 40            | 57             | 547           | 40             |
| 68            | 40             | 82            | 228            | 40            | 131            | 396           | 40             | 183           | 539            | 40            | 57             | 548           | 40             |
| 95            | 40             | 93            | 233            | 40            | 125            | 401           | 40             | 277           | 539            | 40            | 118            | 548           | 40             |
| 104           | 40             | 73            | 239            | 40            | 135            | 407           | 40             | 289           | 540            | 40            | 118            | 549           | 40             |
| 104           | 40             | 93            | 256            | 40            | 133            | 417           | 40             | 293           | 541            | 40            | 177            | 549           | 40             |
| 108           | 40             | 58            | 259            | 40            | 130            | 466           | 40             | 259           | 541            | 40            | 178            | 549           | 40             |
| 121           | 40             | 65            | 264            | 40            | 14             | 501           | 40             | 283           | 542            | 40            | 179            | 549           | 40             |
| 123           | 40             | 67            | 311            | 40            | 154            | 507           | 40             | 282           | 542            | 40            | 583            | 550           | 40             |
| 128           | 40             | 100           | 315            | 40            | 167            | 511           | 40             | 285           | 543            | 40            | 179            | 550           | 40             |

### VOL. 252, UNITED STATES REPORTS

| U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. | U. S.<br>Rep. | S. Ct.<br>Rep. |
|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|----------------|
| Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           | Pg.           | Vol.           |
| 1             | 40             | 255           | 140            | 40            | 237            | 341           | 40             | 343           | 465            | 40            | 364            | 568           | 40             |
| 7             | 40             | 271           | 147            | 40            | 257            | 344           | 40             | 333           | 469            | 40            | 369            | 568           | 40             |
| 12            | 40             | 273           | 152            | 40            | 287            | 348           | 40             | 350           | 475            | 40            | 358            | 569           | 40             |
| 18            | 40             | 275           | 159            | 40            | 241            | 353           | 40             | 353           | 485            | 40            | 361            | 570           | 40             |
| 23            | 40             | 279           | 171            | 40            | 244            | 364           | 40             | 347           | 496            | 40            | 409            | 570           | 40             |
| 32            | 40             | 239           | 178            | 40            | 187            | 372           | 40             | 353           | 499            | 40            | 365            | 571           | 40             |
| 37            | 40             | 221           | 189            | 40            | 189            | 376           | 40             | 388           | 504            | 40            | 372            | 572           | 40             |
| 60            | 40             | 228           | 239            | 40            | 205            | 388           | 40             | 404           | 512            | 40            | 374            | 572           | 40             |
| 83            | 40             | 237           | 273            | 40            | 313            | 399           | 40             | 378           | 521            | 40            | 357            | 572           | 40             |
| 85            | 40             | 251           | 286            | 40            | 321            | 408           | 40             | 381           | 523            | 40            | 397            | 573           | 40             |
| 100           | 40             | 306           | 308            | 40            | 319            | 411           | 40             | 371           | 538            | 40            | 414            | 574           | 40             |
| 107           | 40             | 306           | 313            | 40            | 332            | 416           | 40             | 382           | 547            | 40            | 367            | 574           | 40             |
| 109           | 40             | 254           | 317            | 40            | 335            | 436           | 40             | 385           | 553            | 40            | 402            | 575           | 40             |
| 112           | 40             | 309           | 331            | 40            | 338            | 444           | 40             | 355           | 563            | 40            | 357            | 575           | 40             |
| 126           | 40             | 234           | 339            | 40            | 341            | 450           | 40             | 410           | 567            | 40            | 343            | 576           | 40             |

VOL. 253, UNITED STATES REPORTS

| U. S. |      |     | S. Ct. |      |     | U. S. |      |     | S. Ct. |      |     | U. S. |      |     | S. Ct. |      |     | U. S. |      |     | S. Ct. |      |     | U. S. |      |     | S. Ct. |      |     |
|-------|------|-----|--------|------|-----|-------|------|-----|--------|------|-----|-------|------|-----|--------|------|-----|-------|------|-----|--------|------|-----|-------|------|-----|--------|------|-----|
| Rep.  |      |     | Rep.   |      |     | Rep.  |      |     | Rep.   |      |     | Rep.  |      |     | Rep.   |      |     | Rep.  |      |     | Rep.   |      |     | Rep.  |      |     | Rep.   |      |     |
| Pg.   | Vol. | Pg. | Pg.    | Vol. | Pg. | Pg.   | Vol. | Pg. | Pg.    | Vol. | Pg. | Pg.   | Vol. | Pg. | Pg.    | Vol. | Pg. | Pg.   | Vol. | Pg. | Pg.    | Vol. | Pg. | Pg.   | Vol. | Pg. | Pg.    | Vol. | Pg. |
| 1     | 40   | 423 | 117    | 40   | 466 | 221   | 40   | 495 | 345    | 40   | 516 | 475   | 40   | 485 | 483    | 40   | 482 | 492   | 40   | 585 | 492    | 40   | 586 | 492   | 40   | 586 | 492    | 40   | 586 |
| 12    | 40   | 417 | 136    | 40   | 463 | 231   | 40   | 498 | 350    | 40   | 486 | 476   | 40   | 583 | 484    | 40   | 481 | 492   | 40   | 585 | 492    | 40   | 586 | 492   | 40   | 586 | 492    | 40   | 586 |
| 17    | 40   | 419 | 142    | 40   | 444 | 233   | 40   | 499 | 350    | 40   | 588 | 477   | 40   | 583 | 485    | 40   | 481 | 493   | 40   | 586 | 493    | 40   | 586 | 493   | 40   | 586 | 493    | 40   | 586 |
| 25    | 40   | 422 | 149    | 40   | 438 | 243   | 40   | 503 | 412    | 40   | 560 | 477   | 40   | 585 | 485    | 40   | 482 | 494   | 40   | 586 | 494    | 40   | 586 | 494   | 40   | 586 | 494    | 40   | 586 |
| 28    | 40   | 425 | 170    | 40   | 474 | 245   | 40   | 550 | 421    | 40   | 572 | 478   | 40   | 481 | 486    | 40   | 482 | 495   | 40   | 587 | 495    | 40   | 587 | 495   | 40   | 587 | 495    | 40   | 587 |
| 66    | 40   | 435 | 182    | 40   | 478 | 268   | 40   | 534 | 442    | 40   | 570 | 478   | 40   | 585 | 486    | 40   | 483 | 496   | 40   | 587 | 496    | 40   | 587 | 496   | 40   | 587 | 496    | 40   | 587 |
| 71    | 40   | 457 | 187    | 40   | 455 | 275   | 40   | 522 | 447    | 40   | 564 | 479   | 40   | 481 | 487    | 40   | 483 | 497   | 40   | 587 | 497    | 40   | 587 | 497   | 40   | 587 | 497    | 40   | 587 |
| 77    | 40   | 450 | 193    | 40   | 453 | 284   | 40   | 512 | 454    | 40   | 566 | 479   | 40   | 482 | 487    | 40   | 485 | 497   | 40   | 588 | 497    | 40   | 588 | 497   | 40   | 588 | 497    | 40   | 588 |
| 86    | 40   | 454 | 195    | 40   | 540 | 287   | 40   | 527 | 465    | 40   | 580 | 490   | 40   | 482 | 488    | 40   | 485 | 498   | 40   | 588 | 498    | 40   | 588 | 498   | 40   | 588 | 498    | 40   | 588 |
| 90    | 40   | 449 | 206    | 40   | 526 | 300   | 40   | 543 | 473    | 40   | 481 | 481   | 40   | 483 | 489    | 40   | 485 | 499   | 40   | 588 | 499    | 40   | 588 | 499   | 40   | 588 | 499    | 40   | 588 |
| 94    | 40   | 446 | 209    | 40   | 513 | 319   | 40   | 532 | 473    | 40   | 484 | 481   | 40   | 584 | 490    | 40   | 583 | 499   | 40   | 588 | 499    | 40   | 588 | 499   | 40   | 588 | 499    | 40   | 588 |
| 97    | 40   | 504 | 212    | 40   | 514 | 325   | 40   | 558 | 474    | 40   | 484 | 482   | 40   | 482 | 490    | 40   | 584 | 499   | 40   | 588 | 499    | 40   | 588 | 499   | 40   | 588 | 499    | 40   | 588 |
| 101   | 40   | 460 | 217    | 40   | 510 | 330   | 40   | 518 | 474    | 40   | 485 | 482   | 40   | 584 | 491    | 40   | 584 | 499   | 40   | 588 | 499    | 40   | 588 | 499   | 40   | 588 | 499    | 40   | 588 |
| 113   | 40   | 448 | 219    | 40   | 511 | 339   | 40   | 537 | 475    | 40   | 484 | 482   | 40   | 587 | 492    | 40   | 584 | 499   | 40   | 588 | 499    | 40   | 588 | 499   | 40   | 588 | 499    | 40   | 588 |

40 S.Ct.

(vi)



# CASES REPORTED

|                                                                                     | Page |                                                                               | Page |
|-------------------------------------------------------------------------------------|------|-------------------------------------------------------------------------------|------|
| Abrams v. United States.....                                                        | 17   | Austell, Swann v.....                                                         | 344  |
| Ætna Explosives Co., United States v.....                                           | 483  | Austin, Nashville, C. & St. L. R. Co. v....                                   | 14   |
| Ætna Life Ins. Co. v. Brand.....                                                    | 587  |                                                                               |      |
| Aktieselskabet Korn-Og Foderstof Kom-<br>pagniet, Rederiaktiebolaget Atlanten v.... | 332  | Backstay Machine & Leather Co. v. Ham-<br>ilton .....                         | 485  |
| Alabama, Atlantic Coast Line R. Co. v....                                           | 485  | Backus v. Norfolk Southern R. Co.....                                         | 394  |
| Alabama & V. R. Co. v. Beard.....                                                   | 8    | Baender v. United States.....                                                 | 396  |
| Alaska Smokeless Coal Co., United States<br>ex rel., v. Lane.....                   | 33   | Bailey, Baltimore & O. S. W. R. Co. v.....                                    | 118  |
| Alaska S. S. Co., United States v.....                                              | 396  | Bain v. United States.....                                                    | 396  |
| Alaska S. S. Co., United States v.....                                              | 448  | Balcom v. United States.....                                                  | 14   |
| Albers v. United States.....                                                        | 584  | Baltimore Dry Dock & Ship Bldg. Co. v.<br>New York & Porto Rico S. S. Co..... | 178  |
| Allen, Lehigh Valley R. Co. v.....                                                  | 482  | Baltimore Trust Co., Seaboard Air Line R.<br>Co. v.....                       | 16   |
| American Brewing Co., United States v....                                           | 139  | Baltimore & O. R. Co. v. Coffland.....                                        | 218  |
| American Car & Foundry Co., Edward<br>Hines Lumber Co. v.....                       | 179  | Baltimore & O. S. W. R. Co. v. Bailey....                                     | 118  |
| American Car & Foundry Co. v. Rocha....                                             | 11   | Bank of North America, Philadelphia, Pa.,<br>Wysong & Miles Co. v.....        | 13   |
| American Column & Lumber Co. v. United<br>States .....                              | 588  | Bank of North America, Wysong & Miles<br>Co. v.....                           | 343  |
| American Distributing Co. v. Hayes Wheel<br>Co. ....                                | 13   | Bank of Oxford v. Love.....                                                   | 22   |
| American Fidelity Co., American Guaranty<br>Co. v.....                              | 180  | Bankers' Mortg. Loan Co., City Trust Co.<br>v.....                            | 481  |
| American Guaranty Co. v. American Fidel-<br>ity Co.....                             | 180  | Barber Asphalt Pav. Co. v. Woerheide....                                      | 54   |
| American Knife Co. v. Sweeting.....                                                 | 44   | Barber, Hartford Life Ins. Co. v.....                                         | 12   |
| American Ore Reclamation Co. v. Dwight<br>& Lloyd Sintering Co.....                 | 393  | Barber & Co. v. Knutsford, The.....                                           | 396  |
| American Sheet Metal Works, United<br>States, for Use of National Surety Co. v.     | 393  | Barr, King v.....                                                             | 481  |
| American Steel Foundries v. Newton....                                              | 10   | Bates v. Bunker.....                                                          | 247  |
| Ammerman v. United States.....                                                      | 587  | Bates v. Dean.....                                                            | 247  |
| Anderson v. United States.....                                                      | 587  | Bates v. Dresser.....                                                         | 247  |
| Andrews Paper Co., District of Columbia<br>v.....                                   | 481  | Beard, Alabama & V. R. Co. v.....                                             | 8    |
| Antero & Lost Park Reservoir Co. v. Gas<br>Securities Co.....                       | 13   | Beckwith, Ala. v. Minnesota Stove Co.....                                     | 485  |
| Arbuckle, State of Arkansas ex rel., Ft.<br>Smith Lumber Co. v.....                 | 304  | Beckwith's Estate, Inc. v. Commissioner of<br>Patents. ....                   | 414  |
| Archer, United States v.....                                                        | 179  | Beech-Nut Packing Co., Federal Trade<br>Commission v.....                     | 584  |
| Archer v. United States.....                                                        | 342  | Beidler v. United States.....                                                 | 9    |
| Arctic Iron Co. v. Cleveland-Cliffs Iron Co.                                        | 179  | Beidler v. United States.....                                                 | 504  |
| Arizona Copper Co. v. Bray.....                                                     | 12   | Belknap, State of Washington v.....                                           | 118  |
| Arizona Copper Co. v. Hammer.....                                                   | 12   | Belvin v. United States.....                                                  | 15   |
| Arkansas v. Mississippi.....                                                        | 333  | Ben Avon Borough, Ohio Valley Water<br>Co. v.....                             | 527  |
| Arkansas v. Mississippi.....                                                        | 585  | Ben Avon Borough, Ohio Valley Water Co.<br>v.....                             | 583  |
| Arkansas Cent. R. Co. v. Goad.....                                                  | 8    | Benham, Wilson v.....                                                         | 219  |
| Arkansas ex rel. Arbuckle, Ft. Smith Lum-<br>ber Co. v.....                         | 304  | Berkman v. Caminetti.....                                                     | 118  |
| Armour & Co. v. New York, N. H. & H. R.<br>Co. ....                                 | 12   | B. F. Goodrich Co., Munger v.....                                             | 392  |
| Armour & Co. v. Texas & P. R. Co.....                                               | 56   | Bianc, New York Cent. R. Co. v.....                                           | 44   |
| Aron & Co., Hudson Nav. Co. v.....                                                  | 344  | Birge-Forbes Co. v. Heye.....                                                 | 160  |
| A. Schrader's Son Inc., United States v....                                         | 251  | Birmingham v. O'Connell.....                                                  | 53   |
| Ash, J. K. Lumber Co. v.....                                                        | 8    | Birmingham Trust & Savings Co. v. Unit-<br>ed States.....                     | 56   |
| Ash Sheep Co. v. United States, two cases                                           | 241  | Bishop, Ex parte.....                                                         | 179  |
| Ashley v. Wait.....                                                                 | 53   | Bishop, Ex parte.....                                                         | 343  |
| Askren v. Continental Oil Co.....                                                   | 355  | Bivens v. United Timber Corporation, two<br>cases .....                       | 587  |
| Askren v. Sinclair Refining Co.....                                                 | 355  | Bjorge, Curacao Trading Co. v.....                                            | 584  |
| Askren v. Texas Co.....                                                             | 355  | Blancett v. State of New Mexico.....                                          | 395  |
| Atchafalaya Land Co. v. Capdevielle....                                             | 346  | Bliss Co. v. United States.....                                               | 455  |
| Atchison, T. & S. F. R. Co. v. Industrial<br>Commission of State of Illinois.....   | 393  | Bloch v. United States.....                                                   | 481  |
| Atchison, T. & S. F. R. Co., Spiller v....                                          | 466  | Block, Missouri Pac. R. Co. v.....                                            | 586  |
| Atkins v. Garrett.....                                                              | 345  | Blumenstock Bros. Advertising Agency v.<br>Curtis Pub. Co.....                | 385  |
| Atlanta Terminal Co. v. United States....                                           | 219  | Board of Com'rs of Carter County, Okl.,<br>Broadwell v.....                   | 422  |
| Atlanta, The.....                                                                   | 332  | Board of Com'rs of Love County, Okl.,<br>Ward v.....                          | 419  |
| Atlantic Coast Line R. Co., Capps v.....                                            | 345  | Board of Com'rs of Osage County, United<br>States v.....                      | 100  |
| Atlantic Coast Line R. Co. v. State of Ala-<br>bama .....                           | 485  | Board of Medical Examiners of State of<br>Washington, Jordan v.....           | 12   |
| Atlantic Coast Line R. Co. v. United States                                         | 342  | Board of Public Utility Com'rs v. Yncha-<br>usti & Co.....                    | 277  |
| Atlantic Dredging Co., United States v....                                          | 423  |                                                                               |      |
| Augusta Chronicle Pub. Co., Conklin v....                                           | 587  |                                                                               |      |
| Ausplund v. State of Oregon.....                                                    | 56   |                                                                               |      |

|                                                                                         | Page     |                                                                                         | Page     |
|-----------------------------------------------------------------------------------------|----------|-----------------------------------------------------------------------------------------|----------|
| Board of R. Com'rs, Napa Valley Electric Co. v. ....                                    | 174      | Capps v. Atlantic Coast Line R. Co. ....                                                | 345      |
| Bodine, Christian Feigenspan v. ....                                                    | 486, 588 | Carbon Steel Co. v. Lewellyn. ....                                                      | 15       |
| Boegli, Western Union Tel. Co. v. ....                                                  | 167      | Carbon Steel Co. v. Lewellyn. ....                                                      | 283      |
| Boehmer v. Pennsylvania R. Co. v. ....                                                  | 409      | Carlisle v. Collins. ....                                                               | 347      |
| Bollis, Missouri Pac. R. Co. v. ....                                                    | 57       | Carlo Poma, The, Cavallaro v. ....                                                      | 14       |
| Bone v. Commissioners of Marion County. .                                               | 96       | Carolina-Tennessee Power Co., Hiawassee River Power Co. v. ....                         | 330      |
| Boone, Gulf & S. I. R. Co. v. ....                                                      | 220      | Carriere's Estate, In re. ....                                                          | 135      |
| Boone, Gulf & S. I. R. Co. v. ....                                                      | 343      | Carrollton, Jett Bros. Distilling Co. v. ....                                           | 255      |
| Booth, Scott v. ....                                                                    | 484      | Cartas v. United States. ....                                                           | 42       |
| Borough of Ben Avon, Ohio Valley Water Co. v. ....                                      | 527      | Carter, Shaffer v., two cases. ....                                                     | 221      |
| Borough of Ben Avon, Ohio Valley Water Co. v. ....                                      | 583      | Carter, White Oak Fuel Co. v. ....                                                      | 16       |
| Boston West Africa Trading Co. v. Quaker City Morocco Co. ....                          | 585      | Carter County, Okl., Board of Com'rs of, Broadwell v. ....                              | 422      |
| Bouldin v. United States. ....                                                          | 583      | Cavallaro v. Carlo Poma, The. ....                                                      | 14       |
| Bowen, Haymond v. ....                                                                  | 16       | C. C. Taft Co. v. State of Iowa. ....                                                   | 345      |
| Bowers Southern Dredging Co. v. Draper. .                                               | 483      | Cement Tile Machinery Co., T. L. Smith Co. v. ....                                      | 14       |
| Bowles, Gulf, C. & S. F. R. Co. v. ....                                                 | 55       | Central Elevator Co. of Baltimore City v. Dyason. ....                                  | 393      |
| Bowman & Bull, Postal Telegraph-Cable Co. v. ....                                       | 342      | Central Elevator Co. of Baltimore City v. Naam Looze Vennoot Schap. ....                | 393      |
| Boynton, Dempsey v. ....                                                                | 486, 588 | Central of Georgia R. Co., Lee v. ....                                                  | 254      |
| Bracht v. San Antonio & A. P. R. Co. ....                                               | 16       | Central of Georgia R. Co. v. Wright. ....                                               | 1        |
| Bradley, Willem v. ....                                                                 | 395      | Central Pac. R. Co., Lane v. ....                                                       | 483      |
| Bragg v. Weaver. ....                                                                   | 62       | Central R. Co. of New Jersey, Drago v. .                                                | 118      |
| Brand, Aetna Life Ins. Co. v. ....                                                      | 587      | Central R. Co. of New Jersey, Jamison v. .                                              | 14       |
| Branson v. Bush. ....                                                                   | 113      | Central R. Co. of New Jersey, Jay Street Terminal v. ....                               | 14       |
| Bray, Arizona Copper Co. v. ....                                                        | 12       | Chaloner, New York Evening Post Co. v. .                                                | 396      |
| Briggs v. Union Pac. R. Co. ....                                                        | 118      | Champaign County v. People of State of Illinois ex rel. City of Champaign. ....         | 218      |
| Brink, Canfield v. ....                                                                 | 586      | Champaign, People of State of Illinois ex rel., Champaign County v. ....                | 218      |
| Britton v. Union Inv. Co. ....                                                          | 346      | Chapa v. United States. ....                                                            | 393      |
| Broadwell v. Board of Com'rs of Carter County, Okl. ....                                | 422      | Chapman v. Winthroath. ....                                                             | 234      |
| Brooklyn Eastern Dist. Terminal, Liverpool, Brazil & River Plate Steam Nav. Co. v. .... | 66       | Chapman, Hissey for Use of, Erie R. Co. v. ....                                         | 13       |
| Brooks-Scanlon Co. v. Railroad Commission of Louisiana. ....                            | 183      | Charles, Virginia & West Virginia Coal Co. v. ....                                      | 345      |
| Broussard, Ex parte. ....                                                               | 219      | Chase Nat. Bank, United States v. ....                                                  | 361      |
| Broussard v. Crawford. ....                                                             | 219      | Chass v. United States. ....                                                            | 12       |
| Broward Drainage Dist., Everglades Drainage League v. ....                              | 219      | Cheatham Electric Switching Device Co. v. Transit Development Co. ....                  | 343      |
| Brown v. United States. ....                                                            | 119      | Cheek, Prudential Ins. Co. of America v. .                                              | 343      |
| Brown, Houston Oil Co. of Texas v. ....                                                 | 9        | Chesapeake S. S. Co. of Baltimore City v. Hand. ....                                    | 584      |
| Brown, Western Union Tel. Co. v. ....                                                   | 460      | Chesapeake & Potomac Tel. Co. v. Sommerville. ....                                      | 10       |
| Bruce v. Tobin. ....                                                                    | 56       | Chesbrough v. Hotchkiss. ....                                                           | 219      |
| Bryant v. United States. ....                                                           | 117      | Chesbrough v. Northern Trust Co. ....                                                   | 237      |
| Buena Vista, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v. ....       | 179      | Chicago v. Dempcy. ....                                                                 | 53       |
| Bugbee, Hill v. ....                                                                    | 2        | Chicago Bonding & Insurance Co., Lehigh Valley R. Co. v. ....                           | 482      |
| Bugbee, Maxwell v. ....                                                                 | 2        | Chicago, Duluth & Georgian Bay Transit Co. v. Moore. ....                               | 118      |
| Bunker, Bates v. ....                                                                   | 247      | Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co. ....                                | 219      |
| Burke, Union Pac. R. Co. v. ....                                                        | 56       | Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co. ....                                | 504      |
| Burnap v. United States. ....                                                           | 374      | Chicago, R. I. & P. R. Co., Ex parte. ....                                              | 584      |
| Bush, Branson v. ....                                                                   | 113      | Chicago, R. I. & P. R. Co. v. Cole. ....                                                | 68       |
| Butte & Superior Mining Co., Minerals Separation Co. v. ....                            | 55       | Chicago, R. I. & P. R. Co. v. Industrial Commission of Illinois. ....                   | 15       |
| Byron v. United States. ....                                                            | 177      | Chicago, R. I. & P. R. Co. v. Owens. ....                                               | 485      |
| Caffey, Ruppert, Inc., v. ....                                                          | 141      | Chicago, R. I. & P. R. Co. v. Road Improvement Dist. No. 1 of Prairie County, Ark. .... | 395      |
| Cahill, Great Northern R. Co. v. ....                                                   | 457      | Chicago, R. I. & P. R. Co., Spiller v. ....                                             | 466      |
| Caldwell v. Moore Oil Co. ....                                                          | 8        | Chicago, R. I. & P. R. Co. v. Swaim. ....                                               | 344      |
| Caldwell v. Parker. ....                                                                | 388      | Chicago, R. I. & P. R. Co. v. Ward. ....                                                | 275      |
| Calhoun v. Massie. ....                                                                 | 474      | Chicago & A. R. Co., Spiller v. ....                                                    | 466      |
| California, Kosta Kisin v. ....                                                         | 480      | Chicago & E. I. R. Co., Spiller v. ....                                                 | 466      |
| California Industrial Accident Commission, Southern Pac. Co. v. ....                    | 130      | Chicago & N. W. R. Co. v. Van de Zande. .                                               | 10       |
| California Railroad Commission, Napa Valley Electric Co. v. ....                        | 174      | Chicago & N. W. R. Co. v. Van de Zande. .                                               | 395      |
| California Railroad Commission, Producers Transp. Co. v. ....                           | 131      | Childs Co., Lehigh Valley R. Co. v. ....                                                | 482      |
| Cameron v. United States. ....                                                          | 410      | Chin Fong, White v. ....                                                                | 14       |
| Caminetti, Berkman v. ....                                                              | 118      | Chin Fong, White v. ....                                                                | 449      |
| Caminetti, Goldman v. ....                                                              | 118      | Chipman, Limited, v. Thomas B. Jeffrey Co. ....                                         | 172      |
| Caminetti, Goldman v. ....                                                              | 119      | Christensen, National Brake & Electric Co. v. ....                                      | 54       |
| Camors, Schall v. ....                                                                  | 135      | Christian Feigenspan v. Bodine. ....                                                    | 486, 588 |
| Campbell v. Maryland Casualty Co. ....                                                  | 9        |                                                                                         |          |
| Camp Bird v. Howbert. ....                                                              | 344      |                                                                                         |          |
| Canadian Northern R. Co. v. Eggen. ....                                                 | 402      |                                                                                         |          |
| Candee, Delaware, L. & W. R. Co. v. ....                                                | 584      |                                                                                         |          |
| Canfield v. Brink. ....                                                                 | 586      |                                                                                         |          |
| Canfield v. Cornelius. ....                                                             | 586      |                                                                                         |          |
| Capdeville, Atchafalaya Land Co. v. ....                                                | 346      |                                                                                         |          |



# CASES REPORTED

(40 Sup.Ct.)

ix

|                                                                                        | Page |                                                                                           | Page |
|----------------------------------------------------------------------------------------|------|-------------------------------------------------------------------------------------------|------|
| Cincinnati, C. & E. R. Co. v. Commonwealth of Kentucky                                 | 381  | Commercial Credit Co. v. Sponge Exch.                                                     | 587  |
| City and County of Denver, Farncomb v.                                                 | 271  | Bank of Tarpon Springs                                                                    | 587  |
| City and County of Denver, Mountain States Telephone & Telegraph Co. v.                | 219  | Commissioner of Patents, Estate of P. D. Beckwith, Inc., v.                               | 414  |
| City of Birmingham v. O'Connell                                                        | 53   | Commissioners of Marion County, Bone v.                                                   | 96   |
| City of Buena Vista, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v.   | 179  | Commonwealth of Kentucky, Cincinnati, C. & E. R. Co. v.                                   | 381  |
| City of Carrollton, Jett Bros. Distilling Co. v.                                       | 255  | Commonwealth of Kentucky, South Covington & C. St. R. Co. v.                              | 378  |
| City of Champaign, People of State of Illinois ex rel., Champaign v.                   | 218  | Commonwealth of Pennsylvania, Himes v.                                                    | 53   |
| City of Chicago v. Dempey                                                              | 53   | Commonwealth of Pennsylvania v. State of West Virginia                                    | 357  |
| City of Clifton Forge, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v. | 179  | Commonwealth of Virginia, F. S. Royster Guano Co. v.                                      | 560  |
| City of Columbus, Ohio, Ohio State Tel. Co. v.                                         | 218  | Commonwealth of Virginia ex rel. City of Clifton Forge, Virginia-Western Power Co. v.     | 179  |
| City of Covington, Gilligan v.                                                         | 93   | Commonwealth of Virginia ex rel. Town of Covington, Virginia-Western Power Co. v.         | 179  |
| City of Covington, Wagner v.                                                           | 93   | Commonwealth of Virginia ex rel. Town of Lexington, Virginia-Western Power Co. v.         | 179  |
| City of Dallas, Gill v.                                                                | 343  | Commonwealth of Virginia ex rel. Westinghouse Electric & Mfg. Co., National Surety Co. v. | 13   |
| City of Ennis, Houston & T. C. R. Co. v.                                               | 393  | Concrete Steel Co. v. Vandenburg                                                          | 11   |
| City of Fulton v. Public Service Commission of Missouri                                | 342  | Conklin v. Augusta Chronicle Pub. Co.                                                     | 587  |
| City of Indianapolis, H. Lauter Co. v.                                                 | 10   | Conkling Mining Co., Silver King Coalition Mines Co. v.                                   | 13   |
| City of Indianapolis, Nordyke & Marmon Co. v.                                          | 10   | Conkling Mining Co., Silver King Coalition Mines Co. v.                                   | 585  |
| City of Lexington ex rel. Coyne, Purcell v.                                            | 583  | Connors, Erie R. Co. v.                                                                   | 179  |
| City of Lincoln, Lincoln Gas & Electric Light Co. v.                                   | 585  | Consolidated Gas Co. of New York, City of New York v.                                     | 15   |
| City of Los Angeles v. Los Angeles Gas & Electric Corporation                          | 76   | Consolidated Gas Co. of New York, City of New York v.                                     | 511  |
| City of Louisville, Kentucky Heating Co. v.                                            | 53   | Consolidated Window Glass Co. v. Window Glass Mach. Co.                                   | 179  |
| City of Milwaukee, State of Wisconsin ex rel., Milwaukee Electric Ry. & Light Co. v.   | 306  | Continental Bank of New York v. Prentice                                                  | 220  |
| City of New York v. Consolidated Gas Co. of New York                                   | 15   | Continental Oil Co., Askren v.                                                            | 355  |
| City of New York v. Consolidated Gas Co. of New York                                   | 511  | Continental Trust Co., Commercial Credit Co. v.                                           | 485  |
| City of New York, Dunbar v.                                                            | 250  | Cornelius, Canfield v.                                                                    | 586  |
| City of Oil City, Postal Telegraph-Cable Co. v.                                        | 8    | Cornell Steamboat Co., Morris & Cumings Dredging Co. v.                                   | 180  |
| City of Providence, Joslin v.                                                          | 55   | Corsicana Nat. Bank of Corsicana v. Johnson                                               | 82   |
| City of Providence, Joslin Mfg. Co. v.                                                 | 55   | County of Douglas, Neb., v. Smith                                                         | 485  |
| City of Providence, Scituate Light & Power Co. v.                                      | 55   | Covington, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v.                | 179  |
| City of Richmond, Powers v.                                                            | 118  | Covington, Gilligan v.                                                                    | 93   |
| City of Sedalia, State of Missouri ex rel., v. Public Service Commission of Missouri   | 342  | Covington, Wagner v.                                                                      | 93   |
| City of Shreveport, Southwestern Gas & Electric Co. v.                                 | 394  | Coyne, City of Lexington ex rel., Purcell v.                                              | 583  |
| City of Shreveport, Sullivan v.                                                        | 102  | Crane v. United States                                                                    | 117  |
| City of Winchester v. Winchester Waterworks Co.                                        | 123  | Crawford, Broussard v.                                                                    | 219  |
| City Trust Co. v. Bankers' Mortg. Loan Co.                                             | 481  | Cream of Wheat Co. v. Grand Forks County, N. D.                                           | 558  |
| Clark, Lehigh Valley R. Co. v.                                                         | 482  | Crenshaw Bros. & Saffold v. Southern Pac. Co.                                             | 14   |
| Clark Knitting Co. v. Vaughn                                                           | 44   | Crick S. S. Co. v. Perry                                                                  | 345  |
| Cleveland-Cliffs Iron Co., Arctic Iron Co. v.                                          | 179  | Cudahy Packing Co. v. Pryor                                                               | 16   |
| Clifton Forge, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v.         | 179  | Culpepper v. Ocheltree                                                                    | 482  |
| Coffland, Baltimore & O. R. Co. v.                                                     | 218  | Curacao Trading Co. v. Borge                                                              | 584  |
| Coddwell v. United States                                                              | 10   | Curtis Pub. Co., Blumenstock Bros., Advertising Agency v.                                 | 385  |
| Cole, Chicago, R. I. & P. R. Co. v.                                                    | 68   | Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.                            | 404  |
| Cole, Pittsburgh, C., C. & St. L. R. Co. v.                                            | 15   | Cuyamel Fruit Co. v. Johnson Iron Works                                                   | 481  |
| Cole v. Ralph, two cases                                                               | 321  |                                                                                           |      |
| Coleman & Co. v. Tawas Co.                                                             | 14   | Dallas, Gill v.                                                                           | 343  |
| Collins, Carlisle v.                                                                   | 347  | Dana v. Dana                                                                              | 9    |
| Collins, Erie R. Co. v.                                                                | 450  | Darkow v. United States                                                                   | 259  |
| Collins v. Miller                                                                      | 347  | David v. Simmons                                                                          | 583  |
| Colorado, New Mexico v.                                                                | 9    | Davidovich, Superior & Pittsburgh Copper Co. v.                                           | 218  |
| Columbus, Ohio, Ohio State Tel. Co. v.                                                 | 218  | Davis, Davidovich, known as, Superior & Pittsburgh Copper Co. v.                          | 218  |
| Columbus Packing Co. v. State of Ohio ex rel. Schlesinger                              | 16   | Davis, Mergenthaler Linotype Co. v.                                                       | 133  |
| Commercial Casualty Ins. Co. of Newark, Lehigh Valley R. Co. v.                        | 482  | Davis, Weissengolf v.                                                                     | 54   |
| Commercial Credit Co. v. Continental Trust Co.                                         | 485  | Day, Thompson v.                                                                          | 55   |

|                                                                                   | Page     |                                                                                        | Page     |
|-----------------------------------------------------------------------------------|----------|----------------------------------------------------------------------------------------|----------|
| Dean, Bates v. ....                                                               | 247      | Evansville & Bowling Green Packet Co. v. Logan .....                                   | 218      |
| De Four v. United States .....                                                    | 485      | Everglades Drainage League v. Napoleon B. Broward Drainage List.....                   | 219      |
| Delaware, L. & W. R. Co. v. Candee.....                                           | 584      | Everitt, Phillips Co. v.....                                                           | 344      |
| Delaware, L. & W. R. Co. v. Thompson.....                                         | 396      | E. Viegelmann & Co. v. Insular Collector of Customs .....                              | 56       |
| Delaware, L. & W. R. Co., Tomasco v.....                                          | 56       | E. W. Bliss Co. v. United States.....                                                  | 455      |
| Delaware & B. B. R. Co., to Use of Philadelphia & R. R. Co., United States v..... | 118      | Farncomb v. City and County of Denver..                                                | 271      |
| Dempsey, City of Chicago v.....                                                   | 53       | Federal Trade Commission v. Beech-Nut Packing Co. ....                                 | 584      |
| Dempsey v. Boynton.....                                                           | 486, 588 | Federal Trade Commission v. Gratz.....                                                 | 13       |
| Denver, Farncomb v.....                                                           | 271      | Federal Trade Commission v. Gratz.....                                                 | 572      |
| Denver, Mountain States Telephone & Telegraph Co. v. ....                         | 219      | Feigenspan v. Bodine.....                                                              | 486, 588 |
| Di Donato, Philadelphia & R. R. Co. v.....                                        | 482      | Fellows, National Can Co. v.....                                                       | 11       |
| Dillon, Strathearn S. S. Co. v.....                                               | 350      | Feltman v. United States.....                                                          | 586      |
| District of Columbia v. Lisner .....                                              | 482      | Fetters v. United States .....                                                         | 119      |
| District of Columbia v. R. P. Andrews Paper Co. ....                              | 481      | F. H. Orcutt & Son Co. v. National Trust & Credit Co. ....                             | 584      |
| District of Columbia v. Saks & Co.....                                            | 482      | Fidelity Title & Trust Co. v. Dubois Electric Co. ....                                 | 514      |
| Dodge v. United States.....                                                       | 10       | Fidelity & Casualty Co., Lehigh Valley R. Co. v. ....                                  | 482      |
| Donahue v. Donahue .....                                                          | 583      | Fidelity & Casualty Co. of New York v. Schamps .....                                   | 586      |
| Donohoe, Tjosevig v. ....                                                         | 396      | Fieger-Austin Dredging Co. v. Otto Mar-met Coal & Mining Co. ....                      | 13       |
| Doran, Twohy v. ....                                                              | 177      | Fink v. Okmulgee Window Glass Co.....                                                  | 342      |
| Doremus v. United States .....                                                    | 483      | Fink, Pittsburgh, C. C. & St. L. R. Co. v.                                             | 27       |
| Douglas County, Neb., v. Smith.....                                               | 485      | Firestone Tire & Rubber Co., Munger v.....                                             | 392      |
| Drago v. Central R. Co. of New Jersey.....                                        | 118      | First Nat. Bank of Canton, Pa., v. Williams .....                                      | 372      |
| Draper, Bowers Southern Dredging Co. v.                                           | 483      | First Nat. Bank of Sweetwater, Tex., Rust v. ....                                      | 13       |
| Draper, D. W. Ryan Towboat Co. v.....                                             | 483      | First Savings & Banking Co., Kilmer v.....                                             | 179      |
| Dresser v. Bates.....                                                             | 247      | Fleischer, McLaren v. ....                                                             | 482      |
| Drohen, Rowe v. ....                                                              | 396      | F. M. Yaptic & Co., Vargas v.....                                                      | 586      |
| Dryfoos v. Edwards.....                                                           | 106      | Forged Steel Wheel Co. v. Lewellyn.....                                                | 15       |
| Duart, Simmons v.....                                                             | 342      | Forged Steel Wheel Co. v. Lewellyn.....                                                | 283      |
| Dubois Electric Co., Fidelity Title & Trust Co. v. ....                           | 514      | Ft. Smith Lumber Co. v. State of Arkansas ex rel. Arbuckle .....                       | 304      |
| Duhne v. State of New Jersey.....                                                 | 154      | Ft. Smith & W. R. Co. v. Mills.....                                                    | 526      |
| Duluth, S. S. & A. R. Co., Groesbeck v.....                                       | 38       | Foster, Howard v.....                                                                  | 480      |
| Dunbar v. City of New York.....                                                   | 250      | France & Canada S. S. Corporation v. Storgard .....                                    | 394      |
| Duncan v. United States.....                                                      | 178      | Frazier, Green v. ....                                                                 | 499      |
| Dunkley Co. v. Pasadena Canning Co.....                                           | 481      | Frazier, Scott v.....                                                                  | 503      |
| Du Pont v. Du Pont.....                                                           | 12       | Frazier v. State of Oregon.....                                                        | 392      |
| D'Utassy, Southern Pac. Co. v.....                                                | 57       | Frederick Leyland & Co., Stancil v.....                                                | 584      |
| Dwight & Lloyd Sintering Co., American Ore Reclamation Co. v.....                 | 393      | Freeman Electric Co., Weber Electric Co. v. ....                                       | 483      |
| D. W. Ryan Towboat Co. v. Draper.....                                             | 483      | Freeman-Sweet Co. v. Luminous Unit Co.                                                 | 482      |
| Dyason, Central Elevator Co. of Baltimore City v. ....                            | 393      | Frey & Son v. Welch Grape Juice Co.....                                                | 56       |
| Dyason, Pennsylvania R. Co. v.....                                                | 394      | Friedman v. United States.....                                                         | 15       |
| Eastern Extension, Australasia & China Tel. Co. v. United States.....             | 168      | Frothingham v. United States.....                                                      | 8        |
| Eastern S. S. Corporation, Great Lakes Dredge & Dock v.....                       | 8        | F. S. Royster Guano Co. v. Commonwealth of Virginia .....                              | 560      |
| Edward Hines Lumber Co. v. American Car & Foundry Co.....                         | 179      | Fuller, Oregon-Washington R. & Nav. Co. v. ....                                        | 56       |
| Edwards, Dryfoos v.....                                                           | 106      | Fulton v. Public Service Commission of Missouri .....                                  | 342      |
| Egan, Hartford Poster Advertising Co. v.                                          | 56       | Galbraith v. Vallyely.....                                                             | 344      |
| Eggen, Canadian Northern R. Co. v.....                                            | 402      | Garafio v. United States .....                                                         | 178      |
| E. H. Freeman Electric Co., Weber Electric Co. v. ....                            | 483      | Garcia v. Townshend .....                                                              | 392      |
| Eisner v. Macomber.....                                                           | 189      | Gardner, Mullen v.....                                                                 | 31       |
| Electric Welding Co., Vandenberg v.....                                           | 587      | Garrett, Atkins v. ....                                                                | 345      |
| Embry, State of Oklahoma ex rel., Per-rine v.....                                 | 484      | Garvan, Gregg v.....                                                                   | 396      |
| Empire Fuel Co. v. Lyons.....                                                     | 393      | Garvan, Kelley v.....                                                                  | 396      |
| Ennis, Houston & T. C. R. Co. v.....                                              | 393      | Gas Securities Co., Antero & Lost Park Reservoir Co. v.....                            | 13       |
| Enslin, Houghton v.....                                                           | 482      | Gayon v. McCarthy.....                                                                 | 244      |
| Equi v. United States.....                                                        | 219      | Gearin, Miller v.....                                                                  | 13       |
| Equitable Trust Co. of New York, Lane v.                                          | 344      | Geary v. Geary.....                                                                    | 55       |
| Equitable Trust Co. of New York, Toledo & C. R. Co. v.....                        | 118      | George G. Prendergast Const. Co., Goldsmith v.....                                     | 273      |
| Erickson v. John A. Roebling's Sons Co. of New York .....                         | 394      | Georgia v. South Carolina.....                                                         | 585      |
| Erie R. Co. v. Collins.....                                                       | 450      | Gerard, State of Tennessee ex rel., May-field v.....                                   | 586      |
| Erie R. Co. v. Connors.....                                                       | 179      | German Evangelical Protestant Congrega-tion of Church of Holy Ghost, Schreib-er v..... | 9        |
| Erie R. Co. v. Hissey for Use of Chapman                                          | 13       | Germania Bank of City of New York, Richardson v.....                                   | 393      |
| Erie R. Co. v. Kirby.....                                                         | 10       |                                                                                        |          |
| Erie R. Co. v. Schleenbaker.....                                                  | 13       |                                                                                        |          |
| Erie R. Co. v. Szary.....                                                         | 454      |                                                                                        |          |
| Ervien v. United States.....                                                      | 75       |                                                                                        |          |
| Estate of P. D. Beckwith, Inc., v. Commis-sioner of Patents .....                 | 414      |                                                                                        |          |
| Estopinal, Godchaux Co. v.....                                                    | 116      |                                                                                        |          |
| Eugene Sol Louie v. United States.....                                            | 587      |                                                                                        |          |
| Evans v. Gore .....                                                               | 550      |                                                                                        |          |
| Evans v. National Bank of Savannah.....                                           | 58       |                                                                                        |          |



# CASES REPORTED

(40 Sup.Ct.)

xi

|                                                                      | Page     |                                                                                                  | Page |
|----------------------------------------------------------------------|----------|--------------------------------------------------------------------------------------------------|------|
| Gernat, Gibson v.....                                                | 483      | Hermanos v. Insular Collector of Customs                                                         | 342  |
| Gibson v. Gernat.....                                                | 483      | Heye, Birge-Forbes Co. v.....                                                                    | 160  |
| Gill v. City of Dallas.....                                          | 343      | Heynacher v. United States.....                                                                  | 54   |
| Gillespie, Washburn v.....                                           | 396      | Hiawassee River Power Co. v. Carolina-<br>Tennessee Power Co.....                                | 330  |
| Gilligan v. City of Covington.....                                   | 93       | Hill, The J. J.....                                                                              | 119  |
| Gilson v. United States.....                                         | 119      | Hill, The J. J., Smith v.....                                                                    | 119  |
| Glascok v. McDaniel.....                                             | 395      | Hill v. Bugbee.....                                                                              | 2    |
| Globe Works v. United States.....                                    | 480      | Hiltscher, Jones v.....                                                                          | 218  |
| Goad, Arkansas Cent. R. Co. v.....                                   | 8        | Himes v. Commonwealth of Pennsylvania                                                            | 53   |
| Godchaux Co. v. Estopinal.....                                       | 116      | Hines, Wallace v.....                                                                            | 435  |
| Goepel v. Palmer.....                                                | 392      | Hines Lumber Co. v. American Car &<br>Foundry Co.....                                            | 179  |
| Goldman v. Caminetti.....                                            | 118      | Hissey for Use of Chapman, Erie R. Co. v.                                                        | 13   |
| Goldman v. Caminetti.....                                            | 119      | Hitchcock v. Scattergood.....                                                                    | 118  |
| Goldsmith v. George G. Prendergast Const.<br>Co. ....                | 273      | H. Lauter Co. v. City of Indianapolis....                                                        | 10   |
| Goodrich Co., Munger v.....                                          | 392      | Hogarty v. Philadelphia & R. R. Co.....                                                          | 12   |
| Goodspeed v. Law.....                                                | 119      | Holbert v. Patrick.....                                                                          | 481  |
| Gordon v. People of State of Illinois.....                           | 178      | Holland, State of Missouri v.....                                                                | 382  |
| Gordon, United States ex rel. Weiner v....                           | 16       | Horowitz v. United States.....                                                                   | 396  |
| Gore, Evans v.....                                                   | 550      | Horton, Seaboard Air Line R. Co. v.....                                                          | 180  |
| Gouge v. Hart.....                                                   | 179      | Hosier v. United States.....                                                                     | 54   |
| Graham, Paschall v.....                                              | 453      | Hotchkiss, Chesbrough v.....                                                                     | 219  |
| Graham, Piedmont Power & Light Co. v....                             | 453      | Houghton v. Enslen.....                                                                          | 482  |
| Grand Forks County, N. D., Cream of<br>Wheat Co. v.....              | 558      | Houston v. Ormes.....                                                                            | 369  |
| Grand Trunk Western R. Co. v. United<br>States.....                  | 309      | Houston v. Seaboard Air Line R. Co.....                                                          | 57   |
| Gratz, Federal Trade Commission v.....                               | 13       | Houston Oil Co. of Texas v. Brown.....                                                           | 9    |
| Gratz, Federal Trade Commission v.....                               | 572      | Houston Oil Co. of Texas, Keith Lumber<br>Co. v.....                                             | 13   |
| Gray, Seaboard Air Line R. Co. v.....                                | 218      | Houston & T. C. R. Co. v. City of Ennis..                                                        | 393  |
| Great Lakes Dredge & Dock Co. v. East-<br>ern S. S. Corporation..... | 8        | Howard v. Foster.....                                                                            | 480  |
| Great Northern Pac. S. S. Co., Rainier<br>Brewing Co. v.....         | 54       | Howbert, Camp Bird v.....                                                                        | 344  |
| Great Northern R. Co. v. Cahill.....                                 | 457      | Howell, Lehigh Valley R. Co. v.....                                                              | 482  |
| Great Northern R. Co. v. State of Wash-<br>ington.....               | 177      | Howell, New York Cent. R. Co. v.....                                                             | 396  |
| Green v. Frazier.....                                                | 499      | Hoynes, Metropolitan West Side R. Co. v....                                                      | 395  |
| Gregg v. Garvan.....                                                 | 396      | Hudson Nav. Co. v. J. Aron & Co.....                                                             | 344  |
| Gregory, Kentucky Distilleries & Ware-<br>house Co. v.....           | 486, 588 | Hughes Tool Co., Reed v.....                                                                     | 342  |
| Grier Bros. Co., John Simmons Co. v....                              | 587      | Hull v. Philadelphia & R. R. Co.....                                                             | 358  |
| Griffith v. United States.....                                       | 344      | Hurni Packing Co. v. Mutual Life Ins. Co.<br>of New York.....                                    | 178  |
| Groesbeck v. Duluth, S. S. & A. R. Co....                            | 38       | Hutchinson v. Sperry.....                                                                        | 396  |
| Guardian Trust Co., Shedd v.....                                     | 484      | Illinois, Gordon v.....                                                                          | 178  |
| Gulf, C. & S. F. R. Co. v. Bowles.....                               | 55       | Illinois, Tananecz v.....                                                                        | 346  |
| Gulf & S. I. R. Co. v. Boone.....                                    | 220      | Illinois Cent. R. Co., Spiller v.....                                                            | 466  |
| Gulf & S. I. R. Co. v. Boone.....                                    | 343      | Illinois Commercial Men's Ass'n, Pemble-<br>ton v.....                                           | 178  |
| Gutierrez Hermanos v. Insular Collector<br>of Customs.....           | 342      | Illinois Commercial Men's Ass'n, Pemble-<br>ton v.....                                           | 483  |
| Hagemeyer Trading Co., St. Paul Fire &<br>Marine Ins. Co. v.....     | 588      | Illinois ex rel. City of Champaign, Cham-<br>paign County v.....                                 | 218  |
| Hallowell v. United States.....                                      | 180      | Illinois Industrial Commission, Chicago R.<br>I. & P. R. Co. v.....                              | 15   |
| Halsted, Virginian R. Co. v.....                                     | 10       | Indianapolis, H. Lauter Co. v.....                                                               | 10   |
| Hamilton, Backstay Machine & Leather<br>Co. v.....                   | 485      | Indianapolis, Nordyke & Marmon Co. v....                                                         | 10   |
| Hamilton v. Kentucky Distilleries & Ware-<br>house Co.....           | 106      | Industrial Accident Commission of State of<br>California, Southern Pac. Co. v.....               | 130  |
| Hamlin v. Wellington.....                                            | 14       | Industrial Commission of Illinois, Atchi-<br>son, T. & S. F. R. Co. v.....                       | 293  |
| Hammer, Arizona Copper Co. v.....                                    | 12       | Industrial Commission of Illinois, Chicago,<br>R. I. & P. R. Co. v.....                          | 15   |
| Hancock, Philadelphia & R. R. Co. v....                              | 54       | Industrial Commission of State of Illinois,<br>Atchison, T. & S. F. R. Co. v.....                | 393  |
| Hancock, Philadelphia & R. R. Co. v.....                             | 512      | Insular Collector of Customs, E. Viegel-<br>mann & Co. v.....                                    | 56   |
| Hand, Chesapeake S. S. Co. of Baltimore<br>City v.....               | 584      | Insular Collector of Customs, Gutierrez<br>Hermanos v.....                                       | 342  |
| Hanrahan v. Pacific Transport Co.....                                | 345      | International Nickel Co., State of New<br>York v.....                                            | 343  |
| Hardin-Wyandot Lighting Co. v. Village of<br>Upper Sandusky.....     | 104      | Interstate Business Men's Accident Ass'n<br>v. Lester.....                                       | 11   |
| Hardy v. United States.....                                          | 9        | Interstate Commerce Commission, Kansas<br>City Southern R. Co., United States ex<br>rel., v..... | 187  |
| Harris v. State of Kansas.....                                       | 178      | Interstate Commerce Commission, United<br>States ex rel. Kansas City Southern R.<br>Co. v.....   | 187  |
| Hart, Gouge v.....                                                   | 179      | Inter-Urban R. Co. v. Smith.....                                                                 | 57   |
| Hartford Life Ins. Co. v. Barber.....                                | 12       | Inter-Urban R. Co. v. Smith.....                                                                 | 482  |
| Hartford Poster Advertising Co. v. Egan                              | 56       | Iowa, C. C. Taft Co. v.....                                                                      | 345  |
| Hawke v. Smith.....                                                  | 495      | Isabella, The.....                                                                               | 178  |
| Hawke v. Smith.....                                                  | 498      | Jackson v. Smith.....                                                                            | 10   |
| Hayden, Keown v.....                                                 | 10       | Jacob Ruppert, Inc., v. Caffey.....                                                              | 141  |
| Hayes Wheel Co., American Distributing<br>Co. v.....                 | 13       | Jamison v. Central R. Co. of New Jersey..                                                        | 14   |
| Haymond v. Bowen.....                                                | 16       |                                                                                                  |      |
| Hays v. Port of Seattle.....                                         | 125      |                                                                                                  |      |
| H. D. Smith & Co., Peck, Stow & Wilcox<br>Co. v.....                 | 588      |                                                                                                  |      |
| Henry v. United States.....                                          | 185      |                                                                                                  |      |
| Herman v. United States.....                                         | 179      |                                                                                                  |      |



|                                                                                                   | Page |                                                                                                           | Page |
|---------------------------------------------------------------------------------------------------|------|-----------------------------------------------------------------------------------------------------------|------|
| J. Aron & Co., Hudson Nav. Co. v.....                                                             | 344  | Kirby, Erie R. Co. v.....                                                                                 | 10   |
| Jay v. Weinberg .....                                                                             | 396  | Kirchner v. United States .....                                                                           | 16   |
| Jay Street Terminal v. Central R. Co. of<br>New Jersey .....                                      | 14   | Kittanning Iron & Steel Mfg. Co., Penn-<br>sylvania R. Co. v. ....                                        | 532  |
| Jeffrey Co., Chipman, Limited, v.....                                                             | 172  | Kline, Shapley v. ....                                                                                    | 11   |
| Jenkins, Union Pac. R. Co. v.....                                                                 | 393  | Knickerbocker Ice Co. v. Stewart.....                                                                     | 438  |
| Jenkins, Union Pac. R. Co. v.....                                                                 | 585  | Knutsford, The .....                                                                                      | 396  |
| Jeong Quey How v. White.....                                                                      | 180  | Knutsford, The, Barber & Co. v.....                                                                       | 396  |
| Jett Bros. Distilling Co. v. City of Carroll-<br>ton .....                                        | 255  | Kollman v. United States.....                                                                             | 485  |
| J. J. Hill, The.....                                                                              | 119  | Kosta Kisin v. State of California.....                                                                   | 480  |
| J. J. Hill, The, Smith v.....                                                                     | 119  | Krichman v. United States.....                                                                            | 344  |
| J. K. Lumber Co. v. Ash.....                                                                      | 8    | Kruse v. United States.....                                                                               | 586  |
| Job & Co., Oneida Nav. Corporation v....                                                          | 357  | K. Sugawa & Co., Low v.....                                                                               | 8    |
| John A. Roebling's Sons Co. of New York,<br>Erickson v. ....                                      | 394  | Kwock Jan Fat v. White .....                                                                              | 566  |
| John Simmons Co. v. Grier Bros. Co.....                                                           | 587  | Lamar v. United States .....                                                                              | 16   |
| John Wanamaker, New York, Meccano,<br>Limited, v. ....                                            | 463  | Lane v. Central Pac. R. Co.....                                                                           | 483  |
| Johnson, Corsicana Nat. Bank of Corsi-<br>cana v. ....                                            | 82   | Lane v. Equitable Trust Co. of New York                                                                   | 344  |
| Johnson, Northwestern Mut. Life Ins.<br>Co. v.....                                                | 9    | Lane, Northern Pac. R. Co. v.....                                                                         | 483  |
| Johnson, United States, ex rel., v. Payne..                                                       | 513  | Lane, Shaw v. ....                                                                                        | 394  |
| Johnson Iron Works, Cuyamel Fruit Co.<br>v. ....                                                  | 481  | Lane, Southern Pac. Co. v. ....                                                                           | 584  |
| Jones v. Hiltcher .....                                                                           | 218  | Lane v. State of New Mexico.....                                                                          | 484  |
| Jones, Stennick v. ....                                                                           | 11   | Lane, United States ex rel., Alaska Smoke-<br>less Coal Co. v. ....                                       | 33   |
| Jordan v. Board of Medical Examiners of<br>State of Washington .....                              | 12   | Lane v. United States ex rel. Newton....                                                                  | 394  |
| Joslin v. City of Providence .....                                                                | 55   | Lane, United States ex rel. Sykes v.....                                                                  | 484  |
| Joslin Mfg. Co. v. City of Providence.....                                                        | 55   | Lang v. New York Cent. R. Co.....                                                                         | 482  |
| Joyce Co., State of Louisiana v.....                                                              | 481  | Laughter v. United States.....                                                                            | 220  |
| Jung Back Sing v. White.....                                                                      | 54   | Lauter Co. v. City of Indianapolis.....                                                                   | 10   |
| Junior Order United American Mechanics<br>v. Nicodemus.....                                       | 56   | Law, Goodspeed v. ....                                                                                    | 119  |
| Kane Glass Co. v. Window Glass Mach. Co.                                                          | 179  | Leary v. United States .....                                                                              | 446  |
| Kansas, Harris v. ....                                                                            | 178  | Le Crone v. McAdoo.....                                                                                   | 510  |
| Kansas City v. Public Service Commission<br>of Missouri .....                                     | 54   | Lederer v. Northern Trust Co.....                                                                         | 483  |
| Kansas City v. Public Service Commission<br>of Missouri .....                                     | 346  | Lederer, Penn Mut. Life Ins. Co. v.....                                                                   | 14   |
| Kansas City Bolt & Nut Co. v. Kansas City<br>Light & Power Co. ....                               | 392  | Lederer, Penn Mut. Life Ins. Co. v.....                                                                   | 397  |
| Kansas City Light & Power Co., Kansas<br>City Bolt & Nut Co. v. ....                              | 392  | Lederer, Worth Bros. Co. v.....                                                                           | 15   |
| Kansas City, M. & O. R. Co. of Texas v.<br>United States .....                                    | 162  | Lederer, Worth Bros. Co. v.....                                                                           | 282  |
| Kansas City Southern R. Co. v. Smith....                                                          | 56   | Lee v. Central of Georgia R. Co.....                                                                      | 254  |
| Kansas City Southern R. Co. v. United<br>States .....                                             | 257  | Lee, Malleable Iron Range Co. v.....                                                                      | 342  |
| Kansas City Southern R. Co., United<br>States ex rel., v. Interstate Commerce<br>Commission ..... | 187  | Lee v. Minor.....                                                                                         | 485  |
| Keith, Kilmer v. ....                                                                             | 344  | Leflore County, Miss., National Surety Co.<br>v. ....                                                     | 583  |
| Keith Lumber Co. v. Houston Oil Co. of<br>Texas .....                                             | 13   | Lehigh Coal & Navigation Co. v. United<br>States .....                                                    | 24   |
| Kelley v. Garvan .....                                                                            | 396  | Lehigh Valley R. Co. v. Allen .....                                                                       | 482  |
| Kelly v. McKeown .....                                                                            | 16   | Lehigh Valley R. Co. v. Chicago Bonding<br>& Insurance Co. ....                                           | 482  |
| Kenney v. Supreme Lodge of the World,<br>Loyal Order of Moose.....                                | 371  | Lehigh Valley R. Co. v. Childs Co.....                                                                    | 482  |
| Kentucky, Cincinnati, C. & E. R. Co. v....                                                        | 381  | Lehigh Valley R. Co. v. Clark.....                                                                        | 482  |
| Kentucky, South Covington & C. St. R.<br>Co. v.....                                               | 378  | Lehigh Valley R. Co. v. Commercial Casu-<br>alty Ins. Co. of Newark.....                                  | 482  |
| Kentucky Distilleries & Warehouse Co. v.<br>Gregory .....                                         | 486  | Lehigh Valley R. Co. v. Fidelity & Casual-<br>ty Co. ....                                                 | 482  |
| Kentucky Distilleries & Warehouse Co.,<br>Hamilton v. ....                                        | 106  | Lehigh Valley R. Co. v. Howell.....                                                                       | 482  |
| Kentucky Heating Co. v. City of Louisville                                                        | 53   | Lehigh Valley R. Co. v. Lloyds Plate Glass<br>Ins. Co. of New York .....                                  | 482  |
| Keown v. Hayden .....                                                                             | 10   | Lehigh Valley R. Co. v. Metropolitan Casu-<br>alty Ins. Co. of New York.....                              | 482  |
| Keown v. Keown .....                                                                              | 218  | Lehigh Valley R. Co. v. New York Plate<br>Glass Ins. Co. ....                                             | 482  |
| Keown v. Trudo .....                                                                              | 11   | Lehigh Valley R. Co. v. Ocean Accident &<br>Guarantee Corporation, Limited, of Lon-<br>don, England ..... | 482  |
| Keppelmann v. Palmer .....                                                                        | 392  | Lehigh Valley R. Co. v. Royal Indemnity<br>Co. ....                                                       | 482  |
| Ketchum v. Pleasant Valley Coal Co.....                                                           | 14   | Lehigh Valley R. Co. v. Trustees of St.<br>Paul's Evangelical Lutheran Church....                         | 482  |
| Kever v. Philadelphia & Reading Coal &<br>Iron Co. ....                                           | 13   | Lehigh Valley R. Co., United States v....                                                                 | 483  |
| Kidd, Sullivan v. ....                                                                            | 484  | Lemke v. United States.....                                                                               | 259  |
| Kilmer v. First Savings & Banking Co....                                                          | 179  | Le More's Estate, In re.....                                                                              | 135  |
| Kilmer v. Keith .....                                                                             | 344  | Lester, Interstate Business Men's Accident<br>Ass'n v.....                                                | 11   |
| King v. Barr .....                                                                                | 481  | Levy, Weidhorn v. ....                                                                                    | 534  |
| Kings County Trust Co., Queens Land &<br>Title Co. v. ....                                        | 395  | Lewellyn, Carbon Steel Co. v.....                                                                         | 15   |
| Kinney v. Plymouth Rock Squab Co.....                                                             | 484  | Lewellyn, Carbon Steel Co. v.....                                                                         | 283  |
|                                                                                                   |      | Lewellyn, Forged Steel Wheel Co. v.....                                                                   | 15   |
|                                                                                                   |      | Lewellyn, Forged Steel Wheel Co. v.....                                                                   | 285  |
|                                                                                                   |      | Lexington, Commonwealth of Virginia ex<br>rel., Virginia-Western Power Co. v....                          | 179  |
|                                                                                                   |      | Lexington ex rel. City of Coyne, Purcell v.                                                               | 583  |
|                                                                                                   |      | Leyland & Co., Stancil v.....                                                                             | 584  |
|                                                                                                   |      | Lincoln, Lincoln Gas & Electric Light Co.<br>v. ....                                                      | 585  |

# CASES REPORTED

(40 Sup.Ct.)

xiii

| Page                                                                                          | Page     |
|-----------------------------------------------------------------------------------------------|----------|
| Lincoln Gas & Electric Light Co. v. City of Lincoln.....                                      | 585      |
| Lindsey v. United States.....                                                                 | 393      |
| Lippincott, Todd v.....                                                                       | 12       |
| Lisner, District of Columbia v.....                                                           | 482      |
| Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal             | 66       |
| Lloyds Plate Glass Ins. Co. of New York, Lehigh Valley R. Co. v.....                          | 482      |
| Logan, Evansville & Bowling Green Packet Co. v.....                                           | 218      |
| Los Angeles v. Los Angeles Gas & Electric Corporation.....                                    | 76       |
| Los Angeles Gas & Electric Corporation, City of Los Angeles v.....                            | 76       |
| Louisiana v. William T. Joyce Co.....                                                         | 481      |
| Louisiana, Morgan v.....                                                                      | 588      |
| Louisiana Nav. Co. v. Oyster Commission of Louisiana.....                                     | 54       |
| Louisiana Railroad Commission, Brooks-Scanlon Co. v.....                                      | 183      |
| Louisville, Kentucky Heating Co. v.....                                                       | 53       |
| Louisville & N. R. Co., Morrison v.....                                                       | 11       |
| Love, Bank of Oxford v.....                                                                   | 22       |
| Love, Oklahoma Operating Co. v.....                                                           | 338      |
| Love County, Okl., Board of Com'rs of, Ward v.....                                            | 419      |
| Low v. K. Sugawa & Co.....                                                                    | 8        |
| L. P. & J. A. Smith, United States v.....                                                     | 585      |
| Lucas, Thompson v.....                                                                        | 353      |
| Luminous Unit Co., Freeman-Sweet Co. v.....                                                   | 482      |
| Lyons, Empire Fuel Co. v.....                                                                 | 393      |
| McAdoo, LeCrone v.....                                                                        | 510      |
| McAdoo v. Ormes.....                                                                          | 9        |
| McCabe, Pell v., two cases.....                                                               | 43       |
| McCarthy, Gayon v.....                                                                        | 244      |
| McCarthy, Smedley v.....                                                                      | 118      |
| McCarthy, Smedley v.....                                                                      | 119      |
| McCaull-Dinsmore Co., Chicago, M. & St. P. R. Co. v.....                                      | 219      |
| McCaull-Dinsmore Co., Chicago, M. & St. P. R. Co. v.....                                      | 504      |
| McCay Engineering Co. v. United States                                                        | 392      |
| McCloskey v. Tobin.....                                                                       | 306      |
| McDaniel, Glascock v.....                                                                     | 395      |
| McDonnell, Willson v.....                                                                     | 583      |
| McGrew Coal Co., Missouri Pac. R. Co. v.....                                                  | 503      |
| Mackay, Norma Mining Co. v.....                                                               | 178      |
| McKeown, Kelly v.....                                                                         | 16       |
| McKnight v. United States.....                                                                | 180      |
| MacKnight v. United States.....                                                               | 586      |
| McLaren v. Fleischer.....                                                                     | 482      |
| McLaughlin v. United States.....                                                              | 178      |
| MacMillan, United States v.....                                                               | 510      |
| Macomber, Eisner v.....                                                                       | 189      |
| Magma Copper Co. v. Rissala.....                                                              | 177      |
| Magrane-Houston Co., Standard Fashion Co. v.....                                              | 54       |
| Maguire v. Trefry.....                                                                        | 417      |
| Mail Divisor Cases (Northern Pac. R. Co. v. United States).....                               | 162      |
| Malleable Iron Range Co. v. Lee.....                                                          | 342      |
| Manitowoc Products Co., Sawyer v.....                                                         | 486, 588 |
| Manners v. Morosco.....                                                                       | 335      |
| Manners v. Morosco.....                                                                       | 481      |
| Marion County, Commissioners of, Bone v.                                                      | 96       |
| Mark Owen & Co., Michigan Cent. R. Co. v.....                                                 | 483      |
| Marmet Coal & Mining Co., Fieger-Austin Dredging Co. v.....                                   | 13       |
| Marshall v. People of State of New York                                                       | 396      |
| Maryanne, The.....                                                                            | 345      |
| Maryanne Shipping Co. v. Ramberg Iron Works.....                                              | 345      |
| Maryland Casualty Co., Campbell v.....                                                        | 9        |
| Maryland Casualty Co. v. United States                                                        | 9        |
| Maryland Casualty Co. v. United States                                                        | 155      |
| Mason v. Shannon.....                                                                         | 392      |
| Massie, Calhoun v.....                                                                        | 474      |
| Maxwell v. Bugbee.....                                                                        | 2        |
| Mayfield v. State of Tennessee ex rel. Gerard.....                                            | 586      |
| Maynard v. United Thacker Coal Co.....                                                        | 119      |
| Meccano, Limited, v. John Wanamaker, New York.....                                            | 463      |
| Mergenthaler Linotype Co. v. Davis.....                                                       | 133      |
| Metropolitan Casualty Ins. Co. of New York, Lehigh Valley R. Co. v.....                       | 482      |
| Metropolitan West Side Elevated R. Co. v. Hoyne.....                                          | 395      |
| Metropolitan West Side Elevated R. Co. v. Sanitary Dist. of Chicago.....                      | 395      |
| Michigan Cent. R. Co. v. Mark Owen & Co.....                                                  | 483      |
| Mill Creek & Mine Hill Nav. & R. Co. to Use of Philadelphia & R. R. Co., United States v..... | 118      |
| Miller, Collins v.....                                                                        | 347      |
| Miller v. Gearin.....                                                                         | 13       |
| Miller, National Life Ins. Co. of Montpelier, Vt., v.....                                     | 9        |
| Miller v. United States.....                                                                  | 394      |
| Mills, Ft. Smith & W. R. Co. v.....                                                           | 526      |
| Milwaukee Electric Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee.....       | 306      |
| Milwaukee, State of Wisconsin ex rel., Milwaukee Electric Ry. & Light Co. v.....              | 396      |
| Minerals Separation v. Butte & Superior Mining Co.....                                        | 55       |
| Minnesota v. Wisconsin.....                                                                   | 313      |
| Minnesota Stove Co., Beckwith Co. v.....                                                      | 485      |
| Minor, Lee v.....                                                                             | 485      |
| Mississippi, Arkansas v.....                                                                  | 333      |
| Mississippi, Arkansas v.....                                                                  | 585      |
| Missouri v. Holland.....                                                                      | 382      |
| Missouri ex rel. City of Sedalia v. Public Service Commission of Missouri.....                | 342      |
| Missouri K. & T. R. Co., Spiller v.....                                                       | 466      |
| Missouri, K. & T. R. Co. v. Zuber.....                                                        | 119      |
| Missouri Pac. R. Co. v. Block.....                                                            | 586      |
| Missouri Pac. R. Co. v. Bollis.....                                                           | 57       |
| Missouri Pac. R. Co. v. McGrew Coal Co.                                                       | 503      |
| Missouri Pac. R. Co. v. Monroe County Road Imp. Dist.....                                     | 395      |
| Missouri Pac. R. Co., Spiller v.....                                                          | 466      |
| Missouri Public Service Commission, City of Fulton v.....                                     | 342      |
| Missouri Public Service Commission, Kansas City v.....                                        | 54       |
| Missouri Public Service Commission, Kansas City v.....                                        | 346      |
| Missouri Public Service Commission, State of Missouri ex rel. City of Sedalia v.....          | 342      |
| Mohney, New York Cent. R. Co. v.....                                                          | 287      |
| Monroe County Road Improvement Dist., Missouri Pac. R. Co. v.....                             | 395      |
| Moor, Parsons v.....                                                                          | 345      |
| Moore, Chicago, Duluth & Georgian Bay Transit Co. v.....                                      | 118      |
| Moore, St. Louis Brewing Ass'n v.....                                                         | 486, 588 |
| Moore, South America, The v.....                                                              | 118      |
| Moore, Wartell v.....                                                                         | 342      |
| Moore Knitting Co., Roxford Knitting Co. v.....                                               | 588      |
| Moore Oil Co., Caldwell v.....                                                                | 8        |
| Moore & Tierney, Roxford Knitting Co. v.....                                                  | 588      |
| Mor, Porto Rico Ry., Light & Power Co. v.....                                                 | 516      |
| Morgan v. State of Louisiana.....                                                             | 588      |
| Morosco, Manners v.....                                                                       | 335      |
| Morosco, Manners v.....                                                                       | 484      |
| Morris & Cummings Dredging Co. v. Cornell Steamboat Co.....                                   | 180      |
| Morrison v. Louisville & N. R. Co.....                                                        | 11       |
| Mountain Gas Co., V. & S. Bottle Co. v.....                                                   | 218      |
| Mountain States Telephone & Telegraph Co. v. City and County of Denver.....                   | 219      |
| Moyers, Newman v.....                                                                         | 9        |
| Moyers, Newman v.....                                                                         | 478      |
| Mullen v. Gardner.....                                                                        | 31       |
| Mullen v. Pickens.....                                                                        | 31       |



|                                             | Page     |                                            | Page |
|---------------------------------------------|----------|--------------------------------------------|------|
| Munday v. Wisconsin Trust Co.....           | 365      | Nichols & Co., Yazoo & M. V. R. Co. v....  | 219  |
| Munger v. B. F. Goodrich Co.....            | 392      | Nicodemus, National Council Junior Order   |      |
| Munger v. Firestone Tire & Rubber Co....    | 392      | United American Mechanics v.....           | 56   |
| Mutual Life Ins. Co. of New York, Hurni     |          | Nordyke & Marmon Co. v. City of Indian-    |      |
| Packing Co. v.....                          | 178      | apolis .....                               | 10   |
| Naam Looze Vennoot Schap, Central Ele-      |          | Norfolk Southern R. Co., Backus v.....     | 394  |
| vator Co. of Baltimore City v.....          | 393      | Norfolk-Southern R. Co. v. Owens.....      | 342  |
| Naam Looze Vennoot Schap, Pennsylvania      |          | Norma Mining Co. v. Mackay.....            | 178  |
| R. Co. v.....                               | 393      | North American Transportation & Trad-      |      |
| Nadeau v. Union Pac. R. Co.....             | 570      | ing Co. v. United States.....              | 518  |
| Napa Valley Electric Co. v. Board of R.     |          | Northern Ohio Traction & Light Co., Cuy-   |      |
| Com'rs of California.....                   | 174      | ahoga River Power Co. v.....               | 404  |
| Napoleon B. Broward Drainage Dist.,         |          | Northern Pac. R. Co. v. Lane.....          | 483  |
| Everglades Drainage League v.....           | 219      | Northern Pac. R. Co. v. United States...   | 162  |
| Nashville, C. & St. L. R. Co. v. Austin.... | 14       | Northern Trust Co., Chesbrough v.....      | 237  |
| National Bank of Savannah, Evans v.....     | 58       | Northern Trust Co., Lederer v.....         | 483  |
| National Brake & Electric Co. v. Christ-    |          | North Pennsylvania R. Co. to Use of Phil-  |      |
| ensen .....                                 | 54       | adelphia & R. R. Co., United States v....  | 118  |
| National Can Co. v. Fellows.....            | 11       | Northwestern Mut. Life Ins. Co. v. John-   |      |
| National Council Junior Order United        |          | son .....                                  | 9    |
| American Mechanics v. Nicodemus.....        | 56       | O'Brien, Ex parte.....                     | 481  |
| National Lead Co. v. United States.....     | 237      | O'Brien v. Public Service Commission of    |      |
| National Life Ins. Co. of Montpelier, Vt.,  |          | First Dist. of State of New York.....      | 55   |
| v. Miller.....                              | 9        | Ocean Accident & Guarantee Corporation,    |      |
| National Prohibition Cases, In re (State    |          | Limited, London, England, Lehigh Valley    |      |
| of Rhode Island v. Palmer).....             | 486      | R. Co. v.....                              | 482  |
| National Surety Co. v. Commonwealth of      |          | Ocheltree, Culpepper v.....                | 482  |
| Virginia ex rel. Westinghouse Electric &    |          | O'Connell, City of Birmingham v.....       | 53   |
| Mfg. Co.....                                | 13       | O'Connell v. United States.....            | 444  |
| National Surety Co. v. Leflore County,      |          | Ohio v. West Virginia.....                 | 357  |
| Miss. ....                                  | 583      | Ohio ex rel. Schlesinger, Columbus Pack-   |      |
| National Surety Co., United States v.....   | 396      | ing Co. v.....                             | 16   |
| National Surety Co. v. United States for    |          | Ohio Public Utilities Commission, Toledo   |      |
| Use of American Sheet Metal Works..         | 393      | & O. C. R. Co. v.....                      | 15   |
| National Trust & Credit Co., F. H. Orcutt   |          | Ohio State Tel. Co. v. City of Columbus,   |      |
| & Son Co. v.....                            | 584      | Ohio .....                                 | 219  |
| Neidlein v. Southern Pac. Co.....           | 10       | Ohio Valley Water Co. v. Ben Avon Bor-     |      |
| Neidlein v. Southern Pac. Co.....           | 11       | ough .....                                 | 527  |
| New Jersey, Duhne v.....                    | 154      | Ohio Valley Water Co. v. Ben Avon Bor-     |      |
| New Jersey v. Palmer.....                   | 345      | ough .....                                 | 583  |
| New Jersey v. Palmer.....                   | 486, 588 | Oil City, Postal Telegraph-Cable Co. v.... | 8    |
| Newman v. Moyers.....                       | 9        | Oklahoma, Oklahoma Gin Co. v.....          | 341  |
| Newman v. Moyers.....                       | 478      | Oklahoma v. Texas.....                     | 353  |
| New Mexico, Blancett v.....                 | 395      | Oklahoma v. Texas.....                     | 394  |
| New Mexico v. Colorado.....                 | 9        | Oklahoma v. Texas, two cases.....          | 580  |
| New Mexico, Lane v.....                     | 484      | Oklahoma v. Texas.....                     | 582  |
| New Orleans Land Co. v. Roussell.....       | 392      | Oklahoma v. Texas, two cases.....          | 585  |
| Newton, American Steel Foundries v.....     | 10       | Oklahoma ex rel. Embry, Perrine v.....     | 484  |
| Newton, United States ex rel., Lane v.....  | 394      | Oklahoma Gin Co. v. State of Oklahoma...   | 341  |
| New York v. Consolidated Gas Co. of New     |          | Oklahoma Operating Co. v. Love.....        | 338  |
| York .....                                  | 15       | Oklahoma R. Co. v. Severns Paving Co....   | 73   |
| New York v. Consolidated Gas Co. of New     |          | Okmulgee Window Glass Co., Fink v.....     | 342  |
| York .....                                  | 511      | Omaha Tribe of Indians v. United States..  | 522  |
| New York, Dunbar v.....                     | 250      | Oneida Nav. Corporation v. W. & S. Job.    |      |
| New York v. International Nickel Co.....    | 343      | & Co.....                                  | 357  |
| New York, Marshal v.....                    | 396      | Orcutt & Son Co. v. National Trust &       |      |
| New York, Sanger v.....                     | 55       | Credit Co.....                             | 584  |
| New York v. Standard Oil Co.....            | 343      | Oregon, Ausplund v.....                    | 56   |
| New York Cent. R. Co. v. Blanc.....         | 44       | Oregon, Frazier v.....                     | 392  |
| New York Cent. R. Co. v. Howell.....        | 396      | Oregon, Wilbur v.....                      | 16   |
| New York Cent. R. Co., Lang v.....          | 482      | Oregon-Washington R. & Nav. Co. v. Ful-    |      |
| New York Cent. R. Co. v. Mohney.....        | 287      | ler .....                                  | 56   |
| New York Cent. & H. R. R. Co. v. United     |          | Ormes, Houston v.....                      | 369  |
| States .....                                | 162      | Ormes, McAdoo v.....                       | 9    |
| New York Cent. & H. R. R. Co. v. York       |          | Orth, Steger v.....                        | 11   |
| & Whitney Co.....                           | 481      | Osage County, Board of Com'rs of, United   |      |
| New York, C. & St. L. R. Co. v. Pugh.....   | 15       | States v.....                              | 100  |
| New York Evening Post Co. v. Chaloner..     | 396      | Otto Marmet Coal & Mining Co., Fieger-     |      |
| New York, N. H. & H. R. Co., Armour &       |          | Austin Dredging Co. v.....                 | 13   |
| Co. v.....                                  | 12       | Owen & Co., Michigan Cent. R. Co. v.....   | 483  |
| New York, N. H. & H. R. Co. v. United       |          | Owens, Chicago, R. I. & P. R. Co. v.....   | 485  |
| States .....                                | 67       | Owens, Norfolk-Southern R. Co. v.....      | 342  |
| New York Plate Glass Ins. Co., Lehigh       |          | Oyster Commission of Louisiana, Louisiana  |      |
| Valley R. Co. v.....                        | 482      | Nav. Co. v.....                            | 54   |
| New York Public Service Commission of       |          | Pacific Gas & Electric Co. v. Police Court |      |
| First Dist., O'Brien v.....                 | 55       | of City of Sacramento, Cal.....            | 79   |
| New York Public Service Commission, Sec-    |          | Pacific Transport Co., Hanrahan v.....     | 345  |
| ond Dist., Pennsylvania Gas Co. v.....      | 279      | Palmer, Goepel v.....                      | 392  |
| New York & Porto Rico S. S. Co., Balti-     |          | Palmer, Keppelmann v.....                  | 392  |
| more Dry Dock & Ship Bldg. Co. v.....       | 178      | Palmer, State of New Jersey v.....         | 345  |
| Nichols, Thompson v.....                    | 343      | Palmer, State of New Jersey v.....         | 486  |
| Nichols v. United States.....               | 9        |                                            |      |

|                                                 | Page |                                                  | Page |
|-------------------------------------------------|------|--------------------------------------------------|------|
| Palmer, State of Rhode Island v.....            | 179  | Pierce v. United States.....                     | 205  |
| Palmer, State of Rhode Island v.....            | 486  | Pittsburgh, C., C. & St. L. R. Co. v. Cole..     | 15   |
| Panama R. Co. v. Toppin.....                    | 319  | Pittsburgh, C., C. & St. L. R. Co. v. Fink..     | 27   |
| Parker, Caldwell v.....                         | 388  | Pittsburgh S. S. Co., Smith v.....               | 119  |
| Parker, Texas & Gulf S. S. Co. v.....           | 485  | Planters' Nat. Bank of Richmond, Va., Wy-        |      |
| Parry, Cricket S. S. Co. v.....                 | 345  | song & Miles Co. v.....                          | 13   |
| Parsons v. Moor.....                            | 345  | Planters' Nat. Bank of Richmond, Va.,            |      |
| Partan v. United States.....                    | 220  | Wysong & Miles Co. v.....                        | 343  |
| Pasadena Canning Co., Dunkley Co. v....         | 481  | Pleasant Valley Coal Co., Ketchum v.....         | 14   |
| Paschall v. Town of Graham.....                 | 453  | Plymouth Rock Squab Co., Kinney v.....           | 484  |
| Patrick, Holbert v.....                         | 481  | Poland, United States v.....                     | 127  |
| Payne, United States ex rel. Johnson v....      | 513  | Police Court of City of Sacramento, Cal.,        |      |
| P. D. Beckwith's Estate, Inc., v. Commis-       |      | Pacific Gas & Electric Co. v.....                | 79   |
| sioner of Patents.....                          | 414  | Polk, Philadelphia & R. R. Co. v.....            | 482  |
| Peck, Stow & Wilcox Co. v. H. D. Smith &        |      | Pollard v. United States.....                    | 344  |
| Co.....                                         | 588  | Port of Seattle, Hays v.....                     | 125  |
| Pell v. McCabe, two cases.....                  | 43   | Porto Rico Ry., Light & Power Co. v.             |      |
| Pembleton v. Illinois Commercial Men's          |      | Mor.....                                         | 516  |
| Ass'n.....                                      | 178  | Postal Telegraph-Cable Co. v. Bowman &           |      |
| Pembleton v. Illinois Commercial Men's          |      | Bull Co.....                                     | 342  |
| Ass'n.....                                      | 483  | Postal Telegraph-Cable Co. v. City of Oil        |      |
| Pennacchio v. United States.....                | 588  | City.....                                        | 8    |
| Penn Mut. Life Ins. Co. v. Lederer.....         | 14   | Postal Telegraph-Cable Co. v. Warren-God-        |      |
| Penn Mut. Life Ins. Co. v. Lederer.....         | 397  | win Lumber Co.....                               | 69   |
| Pennsylvania, Himes v.....                      | 53   | Poston, Western Union Tel. Co. v.....            | 482  |
| Pennsylvania v. West Virginia.....              | 357  | Powers v. City of Richmond.....                  | 118  |
| Pennsylvania Gas Co. v. Public Service          |      | Prendergast Const. Co., Goldsmith v.....         | 273  |
| Commission, Second Dist., of State of           |      | Prentice, Continental Bank of New York           |      |
| New York.....                                   | 279  | v.....                                           | 220  |
| Pennsylvania Public Service Commission,         |      | Producers' Transp. Co. v. Railroad Com-          |      |
| Pennsylvania R. Co. v.....                      | 36   | mission of State of California.....              | 131  |
| Pennsylvania R. Co., Boehmer v.....             | 409  | Providence, Joslin v.....                        | 55   |
| Pennsylvania R. Co. v. Dyason.....              | 394  | Providence, Joslin Mfg. Co. v.....               | 55   |
| Pennsylvania R. Co. v. Kittaning Iron &         |      | Providence, Scituate Light & Power Co.           |      |
| Steel Mfg. Co.....                              | 532  | v.....                                           | 55   |
| Pennsylvania R. Co. v. Naam Looze Ven-          |      | Prudential Ins. Co. of America v. Cheek... 343   |      |
| noot Schap.....                                 | 393  | Prudential Ins. Co. of America v. Ragan.. 14     |      |
| Pennsylvania R. Co. v. Public Service Com-      |      | Pryor, Cudahy Packing Co. v.....                 | 16   |
| mission of Commonwealth of Pennsylva-           |      | P. Sanford Ross, Inc., Sullivan v.....           | 586  |
| nia.....                                        | 36   | Public Service Commission of Common-             |      |
| Pennsylvania R. Co. v. Stiedler.....            | 485  | wealth of Pennsylvania, Pennsylvania R.          |      |
| Pennsylvania Window Glass Co. v. Win-           |      | Co. v.....                                       | 36   |
| dow Glass Mach. Co.....                         | 179  | Public Service Commission of First Dist.         |      |
| People of State of Illinois, Gordon v.....      | 178  | of State of New York, O'Brien v.....             | 55   |
| People of State of Illinois, Tananevich v...    | 346  | Public Service Commission of Missouri,           |      |
| People of State of Illinois ex rel. City of     |      | City of Fulton v.....                            | 342  |
| Champaign, Champaign County v.....              | 218  | Public Service Commission of Missouri,           |      |
| People of State of New York, Marshal v....      | 396  | Kansas City v.....                               | 54   |
| People of State of New York, Sanger v....       | 55   | Public Service Commission of Missouri,           |      |
| Percy R. Pyne, 2d, The.....                     | 357  | Kansas City v.....                               | 346  |
| Perrine v. State of Oklahoma ex rel. Em-        |      | Public Service Commission of Missouri,           |      |
| bry.....                                        | 484  | State of Missouri ex rel. City of Sedalia        |      |
| Peters v. Veasey.....                           | 65   | v.....                                           | 342  |
| Peterson, Ex parte.....                         | 178  | Public Service Commission, Second Dist.,         |      |
| Peterson, In re.....                            | 543  | of State of New York, Pennsylvania Gas           |      |
| Petroleum Rectifying Co. of California, Re-     |      | Co. v.....                                       | 279  |
| ward Oil Co. v.....                             | 119  | Public Utilities Commission of Ohio, Tole-       |      |
| Philadelphia, G. & N. R. Co., Philadelphia      |      | do & O. C. R. Co. v.....                         | 15   |
| & R. R. Co. v.....                              | 14   | Public Utility Com'rs v. Ynchausti & Co.. 277    |      |
| Philadelphia & Reading Coal & Iron Co.,         |      | Pugh, New York, C. & St. L. R. Co. v.....        | 15   |
| Kever v.....                                    | 13   | Purcell v. City of Lexington ex rel. Coyne.. 583 |      |
| Philadelphia & R. R. Co., Delaware & B. B.      |      | Pyne, 2d, The Percy R.....                       | 357  |
| R. Co. to Use of, United States v.....          | 118  | Quaker City Morocco Co., Boston West Af-         |      |
| Philadelphia & R. R. Co. v. Di Donato.... 482   |      | rica Trading Co. v.....                          | 585  |
| Philadelphia & R. R. Co. v. Hancock..... 54     |      | Quaker Oats Co., United States v.....            | 583  |
| Philadelphia & R. R. Co. v. Hancock..... 512    |      | Queens Land & Title Co. v. Kings County          |      |
| Philadelphia & R. R. Co., Hogarty v..... 12     |      | Trust Co.....                                    | 395  |
| Philadelphia & R. R. Co., Hull v.....           | 358  | Ragan, Prudential Ins. Co. of America v. 14      |      |
| Philadelphia & R. R. Co., Mill Creek &          |      | Railroad Commission of California, Napa          |      |
| Mine Hill Nav. & R. R. Co. to Use of,           |      | Valley Electric Co. v.....                       | 174  |
| United States v.....                            | 118  | Railroad Commission of Louisiana, Brooks-        |      |
| Philadelphia & R. R. Co., North Pennsyl-        |      | Scanlon Co. v.....                               | 183  |
| vania R. Co. to Use of, United States v.... 118 |      | Railroad Commission of State of Califor-         |      |
| Philadelphia & R. R. Co. v. Philadelphia,       |      | nia, Producers' Transp. Co. v.....               | 131  |
| G. & N. R. Co.....                              | 14   | Rainier Brewing Co. v. Great Northern            |      |
| Philadelphia & R. R. Co. v. Polk.....           | 482  | Pac. S. S. Co.....                               | 54   |
| Philadelphia & R. R. Co. v. Reynolds.... 482    |      | Ralph, Cole v., two cases.....                   | 321  |
| Philadelphia & R. R. Co. v. Smith.....          | 584  | Ramberg Iron Works, Maryanne Shipping            |      |
| Phillips v. United States.....                  | 584  | Co. v.....                                       | 345  |
| Phillips Co. v. Everitt.....                    | 344  | Randolph v. United States.....                   | 484  |
| Pickens, Mullen v.....                          | 31   | Reading Co. v. United States.....                | 425  |
| Piedmont Power & Light Co. v. Town of           |      | Reading Co. v. United States.....                | 585  |
| Graham.....                                     | 453  |                                                  |      |
| Pierce v. United States.....                    | 15   |                                                  |      |



|                                                                                         | Page     |                                                                                 | Page |
|-----------------------------------------------------------------------------------------|----------|---------------------------------------------------------------------------------|------|
| Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet.....         | 332      | Scott v. Booth.....                                                             | 484  |
| Reed v. Hughes Tool Co.....                                                             | 342      | Scott v. Frazier.....                                                           | 503  |
| Reeder v. United States.....                                                            | 346      | Seaboard Air Line R. Co. v. Baltimore Trust Co.....                             | 16   |
| Reitz v. United States.....                                                             | 219      | Seaboard Air Line R. Co. v. Gray.....                                           | 218  |
| Reward Oil Co. v. Petroleum Rectifying Co. of California.....                           | 119      | Seaboard Air Line R. Co. v. Horton.....                                         | 180  |
| Rex v. United States.....                                                               | 181      | Seaboard Air Line R. Co., Houston v.....                                        | 57   |
| Reynolds, Philadelphia & R. R. Co. v.....                                               | 482      | Seaboard Air Line Ry. v. United States...                                       | 162  |
| Rhode Island v. Palmer.....                                                             | 179      | Seattle, Hays v.....                                                            | 125  |
| Rhode Island v. Palmer.....                                                             | 486, 588 | Sedalia, State of Missouri ex rel., v. Public Service Commission of Missouri... | 342  |
| Richardson v. Germania Bank of City of New York.....                                    | 393      | Selig, Stebbins v.....                                                          | 15   |
| Richmond, Powers v.....                                                                 | 118      | Seufert Bros. Co., United States v.....                                         | 178  |
| Rissala, Magma Copper Co. v.....                                                        | 177      | Seufert Bros. Co., United States ex rel. Williams v.....                        | 178  |
| Road Improvement Dist. No. 1 of Prairie County, Ark., Chicago, R. I. & P. R. Co. v..... | 395      | Severns Paving Co., Oklahoma R. Co. v.                                          | 73   |
| Roberts v. Tennessee Coal, Iron & R. Co.                                                | 9        | Shaffer v. Carter, two cases.....                                               | 221  |
| Rocha, American Car & Foundry Co. v.                                                    | 11       | Shaffer v. United States.....                                                   | 57   |
| Rocha v. Tuason.....                                                                    | 344      | Shannon, Mason v.....                                                           | 392  |
| Roebling's Sons Co. of New York, Erickson v.....                                        | 394      | Shapley v. Kline.....                                                           | 11   |
| Roessler & Hasslacher Chemical Co., Standard Silk Dyeing Co. v.....                     | 11       | Shaw v. Lane.....                                                               | 394  |
| Ross, Inc., Sullivan v.....                                                             | 586      | Shedd v. Guardian Trust Co.....                                                 | 484  |
| Roussell, New Orleans Land Co. v.....                                                   | 392      | Sheehan, Wabash R. Co. v.....                                                   | 342  |
| Rowe v. Drohen.....                                                                     | 396      | Showalter v. United States.....                                                 | 14   |
| Roxford Knitting Co. v. Moore & Tierney                                                 | 588      | Shreveport, Southwestern Gas & Electric Co. v.....                              | 394  |
| Roxford Knitting Co. v. William Moore Knitting Co.....                                  | 588      | Shreveport, Sullivan v.....                                                     | 102  |
| Royal Indemnity Co., Lehigh Valley R. Co. v.....                                        | 482      | Silver King Coalition Mines Co. v. Conkling Mining Co.....                      | 13   |
| Royster Guano Co. v. Commonwealth of Virginia.....                                      | 560      | Silver King Coalition Mines Co. v. Conkling Mining Co.....                      | 585  |
| R. P. Andrews Paper Co., District of Columbia v.....                                    | 481      | Silverthorne Lumber Co. v. United States                                        | 182  |
| Rucker v. Tatlow.....                                                                   | 55       | Simmons, Davidge v.....                                                         | 583  |
| Rudbach, South Coast S. S. Co. v.....                                                   | 233      | Simmons v. Duart.....                                                           | 342  |
| Ruppert, Inc., v. Caffey.....                                                           | 141      | Simmons Co. v. Grier Bros. Co.....                                              | 587  |
| Rust v. First Nat. Bank of Sweetwater, Tex.....                                         | 13       | Simpson, United States v.....                                                   | 364  |
| Ryan Towboat Co. v. Draper.....                                                         | 483      | Simpson v. United States.....                                                   | 367  |
| St. Louis Brewing Ass'n v. Moore....                                                    | 486, 588 | Sinclair Refining Co., Askren v.....                                            | 355  |
| St. Louis, I. M. & S. R. Co., Southern Cotton Oil Co. v.....                            | 396      | Skinner, Union Pac. Coal Co. v.....                                             | 392  |
| St. Louis, I. M. & S. R. Co., Spiller v....                                             | 466      | Smedley v. McCarthy.....                                                        | 118  |
| St. Louis, I. M. & S. R. Co. v. True.....                                               | 392      | Smedley v. McCarthy.....                                                        | 119  |
| St. Louis, I. M. & S. R. Co. v. United States.....                                      | 120      | Smith, Douglas County, Neb., v.....                                             | 485  |
| St. Louis, I. M. & S. R. Co. v. Williams..                                              | 71       | Smith, Hawke v.....                                                             | 495  |
| St. Louis & S. F. R. Co., Spiller v.....                                                | 466      | Smith, Hawke v.....                                                             | 498  |
| St. Paul Fire & Marine Ins. Co. v. Hagemeyer Trading Co.....                            | 588      | Smith, Inter-Urban R. Co. v.....                                                | 57   |
| St. Paul Fire & Marine Ins. Co. v. Thomson.....                                         | 588      | Smith, Inter-Urban R. Co. v.....                                                | 483  |
| St. Paul's Evangelical Lutheran Church, Lehigh Valley R. Co. v.....                     | 482      | Smith, Jackson v.....                                                           | 10   |
| Saks & Co., District of Columbia v.....                                                 | 482      | Smith v. J. J. Hill, The.....                                                   | 119  |
| Salter, Williams v.....                                                                 | 53       | Smith, Kansas City Southern R. Co. v....                                        | 56   |
| San Antonio & A. P. R. Co., Bracht v.....                                               | 16       | Smith, Philadelphia & R. R. Co. v.....                                          | 584  |
| Sandaa v. United States.....                                                            | 587      | Smith, United States v.....                                                     | 585  |
| Sandgren v. Ulster S. S. Co.....                                                        | 394      | Smith Co. v. Cement Tile Machinery Co.                                          | 14   |
| Sanger v. People of State of New York...                                                | 55       | Smith & Co., Peck, Stow & Wilcox Co. v.                                         | 588  |
| Sanitary Dist. of Chicago, Metropolitan West Side Elevator Co. v.....                   | 395      | Sneierson v. United States.....                                                 | 584  |
| Sawyer v. Manitowoc Products Co....                                                     | 486, 588 | Sommerville, Chesapeake & Potomac Tel. Co. v.....                               | 10   |
| Scattergood, Hitchcock v.....                                                           | 118      | South America, The v. Moore.....                                                | 118  |
| Schaefer v. United States.....                                                          | 259      | South Butte Mining Co., Thomas v.....                                           | 483  |
| Schall v. Camors.....                                                                   | 135      | South Carolina, Georgia v.....                                                  | 585  |
| Schamps, Fidelity & Casualty Co. of New York v.....                                     | 586      | South Coast, The.....                                                           | 233  |
| Schleenbaker, Erie R. Co. v.....                                                        | 13       | South Coast S. S. Co. v. Rudbach.....                                           | 233  |
| Schlesinger, State of Ohio ex rel., Columbus Packing Co. v.....                         | 16       | South Covington & C. St. R. Co. v. Commonwealth of Kentucky.....                | 378  |
| Schoberg v. United States.....                                                          | 586      | Southern Cotton Oil Co. v. St. Louis, I. M. & S. R. Co.....                     | 396  |
| Schrader's Son, Inc., United States v....                                               | 251      | Southern Pac. Co., Creunshaw Bros. & Saffold v.....                             | 14   |
| Schreiber v. German Evangelical Protestant Congregation of Church of Holy Ghost.....    | 9        | Southern Pac. Co. v. D'Utassy.....                                              | 57   |
| Schumann v. United States.....                                                          | 10       | Southern Pac. Co. v. Industrial Accident Commission of State of California..... | 130  |
| Scituate Light & Power Co. v. City of Providence.....                                   | 53       | Southern Pac. Co. v. Lane.....                                                  | 584  |
|                                                                                         |          | Southern Pac. Co., Neidlein v.....                                              | 10   |
|                                                                                         |          | Southern Pac. Co., Neidlein v.....                                              | 11   |
|                                                                                         |          | Southern Pac. Co., United States v.....                                         | 47   |
|                                                                                         |          | Southwestern Gas & Electric Co. of City of Shreveport.....                      | 394  |
|                                                                                         |          | Southwick, Western Union Tel. Co. v....                                         | 219  |
|                                                                                         |          | Speight, Western Union Tel. Co. v.....                                          | 344  |
|                                                                                         |          | Sperry, Hutchinson v.....                                                       | 396  |
|                                                                                         |          | Spiller v. Atchison, T. & S. F. R. Co....                                       | 466  |
|                                                                                         |          | Spiller v. Chicago, R. I. & P. R. Co....                                        | 466  |
|                                                                                         |          | Spiller v. Chicago & A. R. Co.....                                              | 466  |
|                                                                                         |          | Spiller v. Chicago & E. I. R. Co.....                                           | 466  |
|                                                                                         |          | Spiller v. Illinois Cent. R. Co.....                                            | 466  |

|                                                                                          | Page     |                                                                                          | Page |
|------------------------------------------------------------------------------------------|----------|------------------------------------------------------------------------------------------|------|
| Spiller v. Missouri, K. & T. Ry. Co.....                                                 | 466      | State of Texas, State of Oklahoma v.....                                                 | 582  |
| Spiller v. Missouri Pac. R. Co.....                                                      | 466      | State of Texas, State of Oklahoma v., two cases .....                                    | 585  |
| Spiller v. St. Louis, I. M. & S. R. Co.....                                              | 466      | State of Washington v. Belknap.....                                                      | 118  |
| Spiller v. St. Louis & S. F. R. Co.....                                                  | 466      | State of Washington, Great Northern R. Co. v. ....                                       | 177  |
| Splain, Stallings v.....                                                                 | 537      | State of West Virginia, Commonwealth of Pennsylvania v. ....                             | 357  |
| Sponge Exch. Bank of Tarpon Springs, Commercial Credit Co. v. ....                       | 587      | State of West Virginia, State of Ohio v... 357                                           |      |
| Sprinkle, United States v.....                                                           | 345      | State of Wisconsin, State of Minnesota v... 313                                          |      |
| Stallings v. Splain.....                                                                 | 537      | State of Wisconsin ex rel. City of Milwaukee, Milwaukee Electric Ry. & Light Co. v. .... | 306  |
| Stancil v. Frederick Leyland & Co.....                                                   | 584      | Stebbins v. Selig.....                                                                   | 15   |
| Standard Brewery, United States v.....                                                   | 139      | Steger v. Orth.....                                                                      | 11   |
| Standard Fashion Co. v. Magrane-Houston Co. ....                                         | 54       | Stennick v. Jones.....                                                                   | 11   |
| Standard Oil Co., State of New York v.... 343                                            |          | Stewart, Knickerbocker Ice Co. v.....                                                    | 438  |
| Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co.....                       | 11       | Stiedler, Pennsylvania R. Co. v.....                                                     | 485  |
| Stark, Stark Bros. Nurseries & Orchards Co. v.....                                       | 15       | Stilson v. United States.....                                                            | 28   |
| Stark Bros. Nurseries & Orchards Co. v. Stark .....                                      | 15       | Storgard, France & Canada S. S. Corporation v. ....                                      | 394  |
| State of Alabama, Atlantic Coast Line R. Co. v. ....                                     | 485      | Strathearn S. S. Co. v. Dillon.....                                                      | 350  |
| State of Arkansas v. State of Mississippi.. 333                                          |          | Stroud v. United States .....                                                            | 50   |
| State of Arkansas v. State of Mississippi.. 585                                          |          | Stroud v. United States .....                                                            | 176  |
| State of Arkansas ex rel. Arbuckle, Ft. Smith Lumber Co. v. ....                         | 304      | Sugawa & Co., Low v.....                                                                 | 8    |
| State of California, Kosta Kisin v.....                                                  | 480      | Sukys v. United States .....                                                             | 28   |
| State of Colorado, State of New Mexico v. ....                                           | 9        | Sullivan v. City of Shreveport.....                                                      | 102  |
| State of Georgia v. State of South Carolina .....                                        | 585      | Sullivan v. Kidd.....                                                                    | 484  |
| State of Illinois, Gordon v.....                                                         | 178      | Sullivan v. P. Sanford Ross, Inc.....                                                    | 586  |
| State of Illinois, Tananevitz v.....                                                     | 346      | Superior & Pittsburgh Copper Co. v. Davidovich .....                                     | 218  |
| State of Illinois ex rel. City of Champaign, Champaign County v.....                     | 218      | Supreme Lodge of the World, Loyal Order of Moose, Kenney v. ....                         | 371  |
| State of Iowa, C. C. Taft Co. v.....                                                     | 345      | Swain, Chicago, R. I. & P. R. Co. v.....                                                 | 344  |
| State of Kansas, Harris v.....                                                           | 178      | Swann v. Austell.....                                                                    | 344  |
| State of Louisiana, Morgan v.....                                                        | 588      | Sweeting, American Knife Co. v.....                                                      | 44   |
| State of Louisiana v. William T. Joyce Co. ....                                          | 481      | Sykes, United States ex rel., v. Lane.... 484                                            |      |
| State of Minnesota v. State of Wisconsin.. 313                                           |          | Szary, Erie R. Co. v.....                                                                | 454  |
| State of Mississippi, State of Arkansas v... 333                                         |          | Taft, Wheeler v.....                                                                     | 584  |
| State of Mississippi, State of Arkansas v... 585                                         |          | Taft Co. v. State of Iowa.....                                                           | 345  |
| State of Missouri v. Holland.....                                                        | 382      | Tananevitz v. People of State of Illinois.. 346                                          |      |
| State of Missouri ex rel. City of Sedalia v. Public Service Commission of Missouri.. 342 |          | Tatlow, Rucker v.....                                                                    | 55   |
| State of New Jersey, Duhne v.....                                                        | 154      | Tawas Co., Coleman & Co. v.....                                                          | 14   |
| State of New Jersey v. Palmer.....                                                       | 345      | Tennessee Coal, Iron & R. Co., Roberts v. ....                                           | 9    |
| State of New Jersey v. Palmer.....                                                       | 486, 588 | Tennessee ex rel. Gerard, Mayfield v.....                                                | 586  |
| State of New Mexico, Blancett v.....                                                     | 295      | Texas, Oklahoma v.....                                                                   | 353  |
| State of New Mexico, Lane v.....                                                         | 484      | Texas, Oklahoma v.....                                                                   | 394  |
| State of New Mexico v. State of Colorado.. 9                                             |          | Texas, Oklahoma v., two cases.....                                                       | 580  |
| State of New York v. International Nickel Co. ....                                       | 343      | Texas, Oklahoma v.....                                                                   | 582  |
| State of New York, Marshal v.....                                                        | 396      | Texas, Oklahoma v., two cases.....                                                       | 585  |
| State of New York, Sanger v.....                                                         | 55       | Texas Co., Askren v.....                                                                 | 355  |
| State of New York v. Standard Oil Co.... 343                                             |          | Texas & Gulf S. S. Co. v. Parker.....                                                    | 485  |
| State of Ohio v. State of West Virginia.. 357                                            |          | Texas & P. R. Co., Armour & Co. v.....                                                   | 56   |
| State of Ohio ex rel. Schlesinger, Columbus Packing Co. v. ....                          | 16       | Theden v. Union Pac. R. Co. ....                                                         | 12   |
| State of Oklahoma, Oklahoma Gin Co. v.... 341                                            |          | Theden v. Union Pac. R. Co.....                                                          | 482  |
| State of Oklahoma v. State of Texas.....                                                 | 353      | Thomas v. South Butte Mining Co.....                                                     | 483  |
| State of Oklahoma v. State of Texas.....                                                 | 394      | Thomas B. Jeffrey Co., Chipman, Limited, v. ....                                         | 172  |
| State of Oklahoma v. State of Texas, two cases .....                                     | 580      | Thompson v. Day.....                                                                     | 55   |
| State of Oklahoma v. State of Texas.... 582                                              |          | Thompson, Delaware, L. & W. R. Co. v. 396                                                |      |
| State of Oklahoma v. State of Texas, two cases .....                                     | 585      | Thompson v. Lucas.....                                                                   | 353  |
| State of Oklahoma ex rel. Embry, Perrine v. ....                                         | 484      | Thompson v. Nichols.....                                                                 | 343  |
| State of Oregon, Ausplund v.....                                                         | 56       | Thompson v. United States.....                                                           | 57   |
| State of Oregon, Frazier v.....                                                          | 392      | Thompson, United States v.....                                                           | 289  |
| State of Oregon, Wilbur v.....                                                           | 16       | Thomsen, St. Paul Fire & Marine Ins. Co. v.....                                          | 588  |
| State of Rhode Island v. Palmer.....                                                     | 179      | Tiedemann v. Tiedemann.....                                                              | 56   |
| State of Rhode Island v. Palmer.... 486, 588                                             |          | Tiffany, In re.....                                                                      | 239  |
| State of South Carolina, State of Georgia v. ....                                        | 585      | Tiffany v. United States.....                                                            | 394  |
| State of Tennessee ex rel. Gerard, Mayfield v. ....                                      | 586      | Tjosevig v. Donohoe.....                                                                 | 396  |
| State of Texas, State of Oklahoma v.....                                                 | 353      | T. L. Smith Co. v. Cement Tile Machinery Co. ....                                        | 14   |
| State of Texas, State of Oklahoma v.....                                                 | 394      | Tobin, Bruce v.....                                                                      | 56   |
| State of Texas, State of Oklahoma v., two cases .....                                    | 580      | Tobin, McCloskey v.....                                                                  | 306  |
|                                                                                          |          | Todd v. Lippincott.....                                                                  | 12   |
|                                                                                          |          | Toledo & C. R. Co. v. Equitable Trust Co. of New York.....                               | 118  |
|                                                                                          |          | Toledo & O. C. R. Co. v. Public Utilities Commission of Ohio.....                        | 15   |
|                                                                                          |          | Tomasco v. Delaware, L. & W. R. Co.... 56                                                |      |
|                                                                                          |          | Toppin, Panama R. Co. v.....                                                             | 319  |



|                                                                                        | Page |                                                                                              | Page |
|----------------------------------------------------------------------------------------|------|----------------------------------------------------------------------------------------------|------|
| Town of Covington, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v..... | 179  | United States, Duncan v.....                                                                 | 178  |
| Town of Graham, Paschall v.....                                                        | 453  | United States, Eastern Extension, Australasia & China Tel. Co. v.....                        | 168  |
| Town of Graham, Piedmont Power & Light Co. v.....                                      | 453  | United States, Equi v.....                                                                   | 219  |
| Town of Lexington, Commonwealth of Virginia ex rel., Virginia-Western Power Co. v..... | 179  | United States, Ervien v.....                                                                 | 75   |
| Townshend, Garcia v.....                                                               | 392  | United States, Eugene Sol Louie v.....                                                       | 587  |
| Trader v. United States.....                                                           | 119  | United States, E. W. Bliss Co. v.....                                                        | 455  |
| Transit Development Co., Cheatham Electric Switching Device Co. v.....                 | 343  | United States, Feltman v.....                                                                | 586  |
| Travis v. Yale & Towne Mfg. Co.....                                                    | 228  | United States, Fettes v.....                                                                 | 119  |
| Tredwell v. United States.....                                                         | 587  | United States, Friedman v.....                                                               | 15   |
| Trefry, Maguire v.....                                                                 | 417  | United States, Frothingham v.....                                                            | 8    |
| Trudo, Keown v.....                                                                    | 11   | United States, Garando v.....                                                                | 178  |
| True, St. Louis, I. M. & S. R. Co. v.....                                              | 392  | United States, Gilson v.....                                                                 | 119  |
| Trustees of St. Paul's Evangelical Lutheran Church, Lehigh Valley R. Co. v.....        | 482  | United States, Globe Works v.....                                                            | 480  |
| Tuason, Rocha v.....                                                                   | 344  | United States, Grand Trunk Western R. Co. v.....                                             | 309  |
| Turner v. Turner.....                                                                  | 10   | United States, Griffith v.....                                                               | 344  |
| Turner v. Wade.....                                                                    | 177  | United States, Hallowell v.....                                                              | 180  |
| Twohy v. Doran.....                                                                    | 177  | United States, Hardy v.....                                                                  | 9    |
| Uhl v. United States.....                                                              | 584  | United States, Henry v.....                                                                  | 185  |
| Ulster S. S. Co., Sandgren v.....                                                      | 394  | United States, Herman v.....                                                                 | 179  |
| Union Inv. Co., Britton v.....                                                         | 346  | United States, Heynacher v.....                                                              | 54   |
| Union Pac. Coal Co. v. Skinner.....                                                    | 392  | United States, Horowitz v.....                                                               | 396  |
| Union Pac. R. Co., Briggs v.....                                                       | 118  | United States, Hosier v.....                                                                 | 54   |
| Union Pac. R. Co. v. Burke.....                                                        | 56   | United States, Kansas City, M. & O. R. Co. of Texas v.....                                   | 162  |
| Union Pac. R. Co. v. Jenkins.....                                                      | 393  | United States, Kansas City Southern R. Co. v.....                                            | 257  |
| Union Pac. R. Co. v. Jenkins.....                                                      | 585  | United States, Kirchner v.....                                                               | 16   |
| Union Pac. R. Co., Nadeau v.....                                                       | 570  | United States, Kollman v.....                                                                | 485  |
| Union Pac. R. Co., Theden v.....                                                       | 12   | United States, Kirchman v.....                                                               | 344  |
| Union Pac. R. Co., Theden v.....                                                       | 482  | United States, Kruse v.....                                                                  | 586  |
| Union Trust Co. v. Woodward & Lothrop                                                  | 343  | United States, Lamar v.....                                                                  | 16   |
| United States, Ex parte.....                                                           | 481  | United States, Laughter v.....                                                               | 220  |
| United States, Abrams v.....                                                           | 17   | United States, Leary v.....                                                                  | 446  |
| United States v. Aetna Explosives Co.....                                              | 483  | United States, Lehigh Coal & Navigation Co. v.....                                           | 24   |
| United States v. Alaska S. S. Co.....                                                  | 396  | United States v. Lehigh Valley R. Co.....                                                    | 483  |
| United States v. Alaska S. S. Co.....                                                  | 448  | United States, Lemke v.....                                                                  | 259  |
| United States, Albers v.....                                                           | 584  | United States, Lindsey v.....                                                                | 393  |
| United States v. American Brewing Co.....                                              | 139  | United States v. L. P. & J. A. Smith.....                                                    | 585  |
| United States, American Column & Lumber Co. v.....                                     | 588  | United States, McCay Engineering Co. v.....                                                  | 392  |
| United States, Ammerman v.....                                                         | 587  | United States, McKnight v.....                                                               | 180  |
| United States, Anderson v.....                                                         | 587  | United States, MacKnight v.....                                                              | 586  |
| United States v. Archer.....                                                           | 179  | United States, McLaughlin v.....                                                             | 178  |
| United States v. Archer.....                                                           | 342  | United States v. MacMillan.....                                                              | 540  |
| United States v. A. Schrader's Son, Inc.....                                           | 251  | United States, Maryland Casualty Co. v.....                                                  | 9    |
| United States, Ash Sheep Co. v., two cases                                             | 241  | United States, Maryland Casualty Co. v.....                                                  | 155  |
| United States, Atlanta Terminal Co. v.....                                             | 219  | United States v. Mill Creek & Mine Hill Nav. & R. Co. to Use of Philadelphia & R. R. Co..... | 118  |
| United States, Atlantic Coast Line R. Co. v.....                                       | 342  | United States, Miller v.....                                                                 | 394  |
| United States v. Atlantic Dredging Co.....                                             | 423  | United States, National Lead Co. v.....                                                      | 237  |
| United States, Baender v.....                                                          | 396  | United States v. National Surety Co.....                                                     | 396  |
| United States, Bain v.....                                                             | 396  | United States, New York Cent. & H. R. R. Co. v.....                                          | 162  |
| United States, Balcom v.....                                                           | 14   | United States, New York, N. H. & H. R. Co. v.....                                            | 67   |
| United States, Beidler v.....                                                          | 9    | United States, Nichols v.....                                                                | 9    |
| United States, Beidler v.....                                                          | 564  | United States v. North American Transportation & Trading Co.....                             | 518  |
| United States, Belvin v.....                                                           | 15   | United States, Northern Pac. R. Co. v.....                                                   | 162  |
| United States, Birmingham Trust & Savings Co. v.....                                   | 56   | United States v. North Pennsylvania R. Co. to Use of Philadelphia & R. R. Co.....            | 118  |
| United States, Bloch v.....                                                            | 481  | United States, O'Connell v.....                                                              | 444  |
| United States v. Board of Com'rs of Osage County, Okl.....                             | 100  | United States v. Omaha Tribe of Indians                                                      | 522  |
| United States, Bouldin v.....                                                          | 583  | United States, Partan v.....                                                                 | 220  |
| United States, Brown v.....                                                            | 119  | United States, Pennacchio v.....                                                             | 588  |
| United States, Bryant v.....                                                           | 117  | United States, Phillips v.....                                                               | 584  |
| United States, Burnap v.....                                                           | 374  | United States, Pierce v.....                                                                 | 15   |
| United States, Byron v.....                                                            | 177  | United States, Pierce v.....                                                                 | 205  |
| United States, Cameron v.....                                                          | 410  | United States v. Poland.....                                                                 | 127  |
| United States, Cartas v.....                                                           | 42   | United States, Pollard v.....                                                                | 344  |
| United States, Chapa v.....                                                            | 393  | United States v. Quaker Oats Co.....                                                         | 583  |
| United States v. Chase Nat. Bank.....                                                  | 361  | United States, Randolph v.....                                                               | 484  |
| United States, Chass v.....                                                            | 12   | United States v. Reading Co.....                                                             | 425  |
| United States, Coldwell v.....                                                         | 10   | United States v. Reading Co.....                                                             | 585  |
| United States, Crane v.....                                                            | 117  | United States, Reeder v.....                                                                 | 346  |
| United States, Darkow v.....                                                           | 259  | United States, Reitz v.....                                                                  | 219  |
| United States, De Four v.....                                                          | 485  | United States, Rex v.....                                                                    | 181  |
| United States v. Delaware & B. B. R. Co. to Use of Philadelphia & R. R. Co.....        | 118  | United States, St. Louis, I. M. & S. R. Co. v.....                                           | 120  |
| United States, Dodge v.....                                                            | 10   | United States, Sandaa v.....                                                                 | 587  |
| United States, Doremus v.....                                                          | 483  | United States, Schaefer v.....                                                               | 259  |
|                                                                                        |      | United States, Schoberg v.....                                                               | 586  |

|                                               | Page |                                              | Page |
|-----------------------------------------------|------|----------------------------------------------|------|
| United States, Schumann v.....                | 10   | Virginia-Western Power Co. v. Common-        |      |
| United States, Seaboard Air Line Ry. v....    | 162  | wealth of Virginia ex rel. City of Clifton   |      |
| United States v. Seufert Bros. Co.....        | 178  | Forge.....                                   | 179  |
| United States, Shaffer v.....                 | 57   | Virginia-Western Power Co. v. Common-        |      |
| United States, Showalter v.....               | 14   | wealth of Virginia ex rel. Town of Cov-      |      |
| United States, Silverthorne Lumber Co. v. 182 |      | ington.....                                  | 179  |
| United States v. Simpson.....                 | 364  | Virginia-Western Power Co. v. Common-        |      |
| United States, Simpson v.....                 | 367  | wealth of Virginia ex rel. Town of Lex-      |      |
| United States, Sneierson v.....               | 584  | ington.....                                  | 179  |
| United States v. Southern Pac. Co.....        | 47   | Virginia & West Virginia Coal Co. v.         |      |
| United States v. Sprinkle.....                | 345  | Charles.....                                 | 345  |
| United States v. Standard Brewery.....        | 139  | Virginian R. Co. v. Halsted.....             | 10   |
| United States, Stilson v.....                 | 28   | Vogel v. United States.....                  | 259  |
| United States, Stroud v.....                  | 50   | V. & S. Bottle Co. v. Mountain Gas Co..      | 218  |
| United States, Stroud v.....                  | 176  |                                              |      |
| United States, Sukys v.....                   | 28   | Wabash R. Co. v. Sheehan.....                | 342  |
| United States, Thompson v.....                | 57   | Wade, Turner v.....                          | 177  |
| United States v. Thompson.....                | 289  | Wagner v. City of Covington.....             | 93   |
| United States, Tiffany v.....                 | 394  | Wait, Ashley v.....                          | 53   |
| United States, Trader v.....                  | 119  | Wallace v. Hines.....                        | 435  |
| United States, Tredwell v.....                | 587  | Wanamaker, New York, Meccano, Limit-         |      |
| United States, Uhl v.....                     | 584  | ed, v.....                                   | 463  |
| United States v. United States Steel Cor-     |      | Ward v. Board of Com'rs of Love County,      |      |
| poration.....                                 | 293  | Okl.....                                     | 419  |
| United States, Vedin v.....                   | 11   | Ward, Chicago, R. I. & P. R. Co. v.....      | 275  |
| United States, Vogel v.....                   | 259  | Warren-Godwin Lumber Co., Postal Tele-       |      |
| United States v. Wayne County, Ky.....        | 394  | graph-Cable Co. v.....                       | 69   |
| United States, Weitzel v.....                 | 485  | Wartell v. Moore.....                        | 342  |
| United States, Werner v.....                  | 259  | Washburn v. Gillespie.....                   | 396  |
| United States, Wessels v.....                 | 481  | Washington v. Belknap.....                   | 118  |
| United States, White v.....                   | 587  | Washington, Great Northern R. Co. v.....     | 177  |
| United States, Wimmer v.....                  | 586  | Wayne County, Ky., United States v.....      | 394  |
| United States, Wine v.....                    | 481  | Weaver, Bragg v.....                         | 62   |
| United States, Workin v.....                  | 9    | Weber Electric Co. v. E. H. Freeman Elec-    |      |
| United States, Zucker v.....                  | 585  | tric Co.....                                 | 483  |
| United States ex rel. Alaska Smokeless        |      | Weidhorn v. Levy.....                        | 534  |
| Coal Co. v. Lane.....                         | 33   | Weinberg, Jay v.....                         | 396  |
| United States ex rel. Johnson v. Payne..      | 513  | Weiner, United States ex rel., v. Gordon..   | 16   |
| United States ex rel. Kansas City South-      |      | Weissengoff v. Davis.....                    | 54   |
| ern R. Co. v. Interstate Commerce Com-        |      | Weitzel v. United States.....                | 485  |
| mission.....                                  | 187  | Welbeck Hall, The.....                       | 393  |
| United States ex rel. Newton, Lane v.....     | 394  | Welbeck Hall, The.....                       | 394  |
| United States ex rel. Sykes v. Lane.....      | 484  | Welch Grape Juice Co., Frey & Son v.....     | 56   |
| United States ex rel. Weiner v. Gordon..      | 16   | Wellington, Hamlin v.....                    | 14   |
| United States ex rel. Williams v. Seufert     |      | Werner v. United States.....                 | 259  |
| Bros. Co.....                                 | 178  | Wessels v. United States.....                | 481  |
| United States for Use of American Sheet       |      | Western Union Tel. Co. v. Boegli.....        | 167  |
| Metal Works, National Surety Co. v....        | 393  | Western Union Tel. Co. v. Brown.....         | 460  |
| United States Steel Corporation, United       |      | Western Union Tel. Co. v. Poston.....        | 482  |
| States v.....                                 | 293  | Western Union Tel. Co. v. Southwick.....     | 219  |
| United Thacker Coal Co., Maynard v....        | 119  | Western Union Tel. Co. v. Speight.....       | 344  |
| United Timber Corporation, Bivens v., two     |      | Westinghouse Electric & Mfg. Co., Com-       |      |
| cases.....                                    | 587  | monwealth of Virginia ex rel., National      |      |
| Upper Sandusky, Hardin-Wyandot Light-         |      | Surety Co. v.....                            | 13   |
| ing Co. v.....                                | 104  | Westmeath, The.....                          | 353  |
| Ute Indians, United States, Rex v.....        | 181  | West Virginia, Ohio v.....                   | 357  |
|                                               |      | West Virginia, Pennsylvania v.....           | 357  |
| Vallely, Galbraith v.....                     | 344  | Wheeler v. Taft.....                         | 584  |
| Vandenburgh, Concrete Steel Co. v.....        | 11   | White v. Chin Fong.....                      | 14   |
| Vandenburgh v. Electric Welding Co.....       | 587  | White v. Chin Fong.....                      | 449  |
| Van de Zande, Chicago & N. W. R. Co. v. 10    |      | White, Jeong Quey How v.....                 | 180  |
| Van de Zande, Chicago & N. W. R. Co. v. 395   |      | White, Jung Back Sing v.....                 | 54   |
| Vargas v. F. M. Yaptico & Co.....             | 586  | White, Kwock Jan Fat v.....                  | 566  |
| Vaughn, Clark Knitting Co. v.....             | 44   | White v. United States.....                  | 587  |
| Veasey, Peters v.....                         | 65   | White, Yee Won v.....                        | 180  |
| Vedin v. United States.....                   | 11   | White Oak Fuel Co. v. Carter.....            | 16   |
| Vieglmann & Co. v. Insular Collector of       |      | Wilbur v. State of Oregon.....               | 16   |
| Customs.....                                  | 56   | Willem v. Bradley.....                       | 395  |
| Village of Upper Sandusky, Hardin-Wyan-       |      | William Moore Knitting Co., Roxford Knit-    |      |
| dot Lighting Co. v.....                       | 104  | ting Co. v.....                              | 588  |
| Virginia ex rel. City of Buena Vista, Vir-    |      | William T. Joyce Co., State of Louisiana v.  | 481  |
| ginia-Western Power Co. v.....                | 179  | Williams, First Nat. Bank of Canton, Pa.,    |      |
| Virginia ex rel. City of Clifton Forge, Vir-  |      | v.....                                       | 372  |
| ginia-Western Power Co. v.....                | 179  | Williams, St. Louis, I. M. & S. R. Co. v.... | 71   |
| Virginia ex rel. Town of Covington, Virgin-   |      | Williams, United States ex rel., v. Seufert  | 178  |
| ia-Western Power Co. v.....                   | 179  | Williams v. Salter.....                      | 53   |
| Virginia ex rel. Town of Lexington, Virgin-   |      | Willson v. McDonnell.....                    | 583  |
| ia-Western Power Co. v.....                   | 179  | Wilson v. Benham.....                        | 219  |
| Virginia ex rel. Westinghouse Electric &      |      | Wimmer v. United States.....                 | 586  |
| Mfg. Co., National Surety Co. v.....          | 13   | Winchester v. Winchester Waterworks Co.      | 123  |
| Virginia, F. S. Royster Guano Co. v.....      | 560  | Winchester Waterworks Co., City of Win-      |      |
| Virginia-Western Power Co. v. Common-         |      | chester v.....                               | 123  |
| wealth of Virginia ex rel. City of Buena      |      | Window Glass Mach. Co., Consolidated         |      |
| Vista.....                                    | 179  | Window Glass Co. v.....                      | 179  |



|                                                                               | Page |                                                                    | Page |
|-------------------------------------------------------------------------------|------|--------------------------------------------------------------------|------|
| Window Glass Mach. Co., Kane Glass Co. v. ....                                | 179  | Wysong & Miles Co. v. Bank of North America, Philadelphia, Pa..... | 343  |
| Window Glass Mach. Co., Pennsylvania Window Glass Co. v.....                  | 179  | Wysong & Miles Co. v. Planters' Nat. Bank of Richmond, Va.....     | 13   |
| Wine v. United States.....                                                    | 481  | Wysong & Miles Co. v. Planters' Nat. Bank of Richmond, Va.....     | 343  |
| Wintroath, Chapman v.....                                                     | 234  | W. & S. Job & Co., Oneida Nav. Corporation v.....                  | 357  |
| Wisconsin, Minnesota v.....                                                   | 513  | Yale & Towne Mfg. Co., Travis v.....                               | 228  |
| Wisconsin ex rel. City of Milwaukee, Milwaukee Electric Ry. & Light Co. v.... | 306  | Yaptico & Co., Vargas v.....                                       | 586  |
| Wisconsin Trust Co., Munday v.....                                            | 365  | Yazoo & M. V. R. Co. v. Nichols & Co....                           | 219  |
| Woerheide, Barber Asphalt Pav. Co. v....                                      | 54   | Yee Won v. White.....                                              | 180  |
| Woodward & Lothrop, Union Trust Co. v.                                        | 343  | Ynchausti & Co., Board of Public Utility Com'rs v.....             | 277  |
| Workin v. United States.....                                                  | 9    | York & Whitney Co. v. New York Cent. & H. R. R. Co.....            | 481  |
| Worth Bros. Co. v. Lederer.....                                               | 15   | Zuber, Missouri, K. & T. R. Co. v.....                             | 119  |
| Worth Bros. Co. v. Lederer.....                                               | 282  | Zucker v. United States.....                                       | 585  |
| Wright, Central of Georgia R. Co. v....                                       | 1    |                                                                    |      |
| Wysong & Miles Co. v. Bank of North America, Philadelphia, Pa.....            | 13   |                                                                    |      |

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT

---

OCTOBER TERM, 1919

---

(250 U. S. 519)

**CENTRAL OF GEORGIA RY. CO. v.  
WRIGHT, Comptroller General of  
State of Georgia.**

(Argued Jan. 21, 1919. Reversed with Costs Feb. 3, 1919. Rehearing Granted as to Certain Specified Points and Denied as to All Others—Order of April 21, 1919. Reargued Oct. 13 and 14, 1919. Decided Oct. 27, 1919.)

No. 30.

**CONSTITUTIONAL LAW** ⇨137—**TAXATION** ⇨  
365—**MERGER OF RAILROADS NOT AFFECTING  
EXEMPTION FROM TAXES BY CHARTER.**

Under the charters granted in 1845 to the Southern and the Muscogee Railroad Companies, making their roads taxable only in a certain way and to a certain amount, *held*, though the companies were later merged, there could be no further taxation of the leasehold of the lessee of the roads.

Mr. Justice McKenna, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Georgia.

On rehearing. Decree on original hearing (248 U. S. 525, 39 Sup. Ct. 181, 63 L. Ed. 401) to stand.

See, also, 249 U. S. 590, 39 Sup. Ct. 387, 63 L. Ed. 791.

\*520

\*Messrs. T. M. Cunningham, Jr., and A. R. Lawton, both of Savannah, Ga., for plaintiff in error.

Mr. Warren Grice, of Macon, Ga., for defendant in error.

\*523

\*Mr. Justice HOLMES delivered the opinion of the Court.

In this case it was decided at the last term that the plaintiff in error, the railway company, was exempt from liability to taxation as lessee of certain roads, 248 U. S. 525, 39 Sup. Ct. 181, 63 L. Ed. 401, as it had been decided a few terms earlier that it was exempt

from taxation upon the fee of the same roads.

\*524

Wright v. Central of Georgia R. Co., \*236 U. S. 674, 35 Sup. Ct. 471, 59 L. Ed. 781. A rehearing was granted on the question whether the exemption thus adjudged to exist extends to portions of the plaintiff in error's road let to it by the Southwestern Railroad and the Muscogee Railroad, which were assumed to be embraced in the decision but were not specially discussed. The consideration of the court was directed especially to the charter of the Augusta and Waynesboro Rail Road granted in 1838 and having features characteristic of the conception of railroads then entertained. 236 U. S. 678, 679, 35 Sup. Ct. 471, 59 L. Ed. 781. It is argued that the charters of the other lessors just named, granted at a later date, even when limiting the corporation's liability to taxation in similar words, should be construed in a different way.

The charters of the Southwestern and the Muscogee Railroads were not granted until 1845, and while like the earlier ones they provided that the said railway and its appurtenances and all property therewith connected, or the capital stock of the said Rail Road Company, should not be subject to be taxed higher than one-half of one per cent. upon its annual net income, they did not contain the provisions that showed the Legislature in 1838 to contemplate indifferently a revenue derived from using, from sharing, or from letting the special privileges granted—provisions that were of weight in the decision of the Court.

But we are satisfied that between 1838 and 1845 there had been no such change in the policy of Georgia as to require the same words to be given a different meaning at the later date from that which we have decided that they had at the former. Circumstances had not changed when express power to let was given in 1852. The Muscogee was merged in the Southwestern under an act of

1856, but the exemption remained superior to legislative change. *Southwestern R. R. Co. v. Georgia*, 92 U. S. 676, 23 L. Ed. 762. As remarked by Chief Justice Waite in a like suit between the same parties, the language of the exempting clause is somewhat unusual, and means the railroad specified in

\*525

the \*charter and none other. *Southwestern R. R. Co. v. Georgia*, 116 U. S. 231, 6 Sup. Ct. 375, 29 L. Ed. 626. But conversely it means that that road shall be exempt while owned by this corporation whether used or demised.

We see nothing in the later statutes or Constitutions that attempts to substitute a new contract or to impair the obligation of the one originally made. Different opinions were entertained on the main question which this rehearing does not reopen; but taking that as settled we cannot believe that any real distinction can be made between the charter of the Augusta and Waynesboro and those of the Southwestern and Muscogee roads.

The decree of last term must stand and that of the state Court must be reversed.

Decree reversed.

Mr. Justice McKENNA, Mr. Justice PITNEY, Mr. Justice BRANDEIS and Mr. Justice CLARKE dissent.

(250 U. S. 525)

MAXWELL et al. v. BUGBEE, Comptroller of Treasury of State of New Jersey et al.

HILL v. SAME.

(Argued March 18 and 19, 1919. Decided Oct. 27, 1919.)

Nos. 43, 238.

1. TAXATION ⇨856, 859(1)—TRANSFER TAX IS ON RIGHT OF SUCCESSION WITHIN TAXING POWER OF STATE.

The tax imposed by Act N. J. April 20, 1909 (P. L. p. 325), §§ 1, 12, as amended by Act April 9, 1914 (P. L. p. 267), on the transfer by will or intestate law of property in the state of a nonresident decedent, is on the right of succession, a creature of local laws, and within the taxing power of the state, and is constitutional.

2. CONSTITUTIONAL LAW ⇨207(1)—STATES PROHIBITED TO DISCRIMINATE AGAINST CITIZENS OF OTHER STATES.

Const. art. 4, § 2, par. 1, is intended to prevent discrimination by the several states against citizens of other states in respect of the fundamental privilege of citizenship.

3. CONSTITUTIONAL LAW ⇨206(1)—PRIVILEGES AND IMMUNITIES PRESERVED TO CITIZENS OF THE UNITED STATES ARE THOSE BASED ON ITS CONSTITUTION AND LAWS.

The privileges and immunities of citizens of the United States, which the Fourteenth

Amendment, recognizing a distinction between citizenship of the United States and citizenship of one of the states, places beyond abridgment by the states, are those which owe their existence to the federal government, its national character, its Constitution, or its laws.

4. CONSTITUTIONAL LAW ⇨206(1), 207(4)—STATE TRANSFER TAX DOES NOT INFRINGE ON RIGHTS OF CITIZENS.

Act N. J. April 20, 1909 (P. L. p. 325), as amended by Act April 9, 1914 (P. L. p. 267), regulating and taxing the right to succeed to property in the state on the death of a nonresident owner, does not infringe any of the rights of citizenship, either of the states or of the United States, secured by Const. art. 4, § 2, par. 1, or the Fourteenth Amendment.

5. CONSTITUTIONAL LAW ⇨206(1), 207(4)—DISCRIMINATION IN TRANSFER TAX BASED ON CITIZENSHIP AND RESIDENCE NOT UNCONSTITUTIONAL.

Any discrimination in Act N. J. April 20, 1909 (P. L. p. 325) §§ 1, 12, as amended by Act April 9, 1914 (P. L. p. 267), being based on deceased's residence within or without the state, Const. art. 4, § 2, par. 1, and the Fourteenth Amendment, as to privileges and immunities of citizens, are not strictly applicable.

6. CONSTITUTIONAL LAW ⇨283—TRANSFER TAX ON PROPERTY IN STATE OF NONRESIDENT DECEDENT NOT WANTING IN DUE PROCESS.

Act N. J. April 20, 1909 (P. L. p. 325) §§ 1, 12, amended by Act April 9, 1914 (P. L. p. 267), by adopting as a measure of the tax on the transfer of property within the state of a nonresident decedent the proportion which the local property bears to the entire estate, does not in effect tax property beyond its jurisdiction, and so amount to a deprivation of property without due process of law.

7. CONSTITUTIONAL LAW ⇨229(1)—TRANSFER TAX ON PROPERTY IN STATE OF NONRESIDENT DECEDENT NOT WANTING IN EQUAL PROTECTION OF LAW.

The equal protection of the law, which must be decided as between resident and nonresident decedents as classes, rather than by the incidents of a particular estate, is not denied by Act N. J. April 20, 1909 (P. L. p. 325), §§ 1, 12, as amended by Act April 9, 1914 (P. L. p. 267), adopting as the measure of the tax on the transfer of property within the state of a nonresident decedent the proportion of the local estate in certain property to the entire estate; the difference in the manner of assessment as between the two classes not being so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the state.

The Chief Justice, Mr. Justice Holmes, Mr. Justice Van Devanter, and Mr. Justice McReynolds, dissenting.

In Error to the Court of Errors and Appeals of the State of New Jersey.

Certiorari by Lawrence Maxwell and another, executors of James McDonald, deceased, against Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and another, to review an assess-



ment of a transfer tax, with a like proceeding by Louis W. Hill, administrator of James J. Hill, deceased. In the former case, judgment of the Supreme Court of New Jersey, affirming the tax, was affirmed by the Court of Errors and Appeals of that state (90 N. J. Law, 707, 101 Atl. 248); and in the latter case, judgment of the Supreme Court, modifying the tax, was affirmed by the Court of Errors and Appeals (92 N. J. Law, 514, 105 Atl. 893). Prosecutors bring error. Affirmed.

In No. 43:

Messrs. Joseph Coult, of Newark, N. J., Lawrence Maxwell, of Cincinnati, Ohio, and William A. Smith, of Newark, N. J., for plaintiffs in error.

Messrs. John W. Westcott, of Camden, N. J., and John R. Hardin, of Newark, N. J., for defendants in error.

In No. 238:

Messrs. E. C. Lindley, of St. Paul, Minn., and Joseph Coult and William A. Smith, both of Newark, N. J., for plaintiff in error.

Mr. John R. Hardin, of Newark, N. J., for defendants in error.

**\*530**

\*Mr. Justice DAY delivered the opinion of the Court.

These cases were argued and submitted together, involve the same constitutional questions, and may be disposed of in a single opinion. The attack is upon the inheritance tax law of the state of New Jersey, and is based upon certain provisions of the federal Constitution. The statute has reference to the method of imposing inheritance taxes under the laws of the state. The constitutionality of the law upon both state and federal grounds was upheld in the McDonald Case by

**\*531**

the Court of Errors and Appeals. 90 N. J. Law, 707, 101 Atl. 248. In the Hill Case the judgment of the Supreme Court of New Jersey (91 N. J. Law, 454, 103 Atl. 861) was affirmed by the Court of Errors and Appeals (92 N. J. Law, 514, 105 Atl. 893).

The statute under consideration is an act approved April 9, 1914, (P. L. 1914, p. 267), being an amendment to an act approved April 20, 1909 (P. L. 1909, p. 325), for taxing the transfer of property of resident and non-resident decedents by devise, bequest, descent, etc., in certain cases. The 1909 act is found in 4 Comp. Stat. N. J. p. 5301 et seq; the amendment, in 1 Supp. Comp. Stat. N. J. pp. 1538-1542. The act of 1909, in its first section, imposed a tax upon the transfer of any property, real and personal, of the value of \$500 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations including the following cases:

"First. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

"Second. When the transfer is by will or in-

testate law, of property within the state, and the decedent was a nonresident of the state at the time of his death."

The taxes thus imposed were at the rate of 5 per cent. upon the clear market value of the property, with exemptions not necessary to be specified, and were payable to the treasurer for the use of the state of New Jersey.

And by section 12 it was provided that upon the transfer of property in that state of a nonresident decedent, if all or any part of the estate, wherever situated, passed to persons or corporations who would have been taxable under the act if the decedent had been a resident of the state, such property located within the state was made subject to a tax bearing the same ratio to the entire tax which the estate of such decedent would have been subject to under the act if the non-resident decedent had been a resident of the state, as the property located in the state

**\*532**

bore to the \*entire estate of such nonresident decedent wherever situated.

The act, having first been amended by an act approved March 26, 1914 (P. L. 1914, p. 91), not necessary to be recited, was again amended by the act approved April 9, 1914, which is now under consideration (P. L. 1914, p. 267; 1 Supp. Comp. Stat. N. J. pp. 1538-1542). Sections 1 and 12 were amended, the former by confining the tax on the transfer of property within the state of nonresident decedents to real estate, tangible personal property and shares of stock of New Jersey corporations and of national banks located within the state; and by modifying the former rate of 5 per centum upon the clear market value of the property passing, which was subject to exemptions in favor of churches and other charitable institutions, and of parents, children, and other lineal descendants, etc., by making 5 per centum the applicable rate, but subject to numerous exceptions, and in the excepted cases imposing different rates, dependent upon the relationship of the beneficiary to the deceased and the amount of the property transferred. Thus:

"Property transferred to any child or children, husband or wife, of a decedent, or to the issue of any child or children of a decedent, shall be taxed at the rate of one per centum on any amount in excess of five thousand dollars, up to fifty thousand dollars; one and one-half per centum on any amount in excess to [of] fifty thousand dollars, up to one hundred and fifty thousand dollars; two per centum on any amount in excess of one hundred and fifty thousand dollars, up to two hundred and fifty thousand dollars; and three per centum on any amount in excess of two hundred and fifty thousand dollars."

The modified formula for computing the assessment upon the transfer of the estate of a nonresident decedent prescribed in section 12 as amended by the act under consideration, is as follows:

"A tax shall be assessed on the transfer of property made \*subject to tax as aforesaid, in this state of a nonresident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such nonresident decedent had been a resident of this state, and all his property, real and personal, had been located within this state, as such taxable property within this state bears to the entire estate, wherever situated: Provided, that nothing in this clause contained shall apply to any specific bequest or devise of any property in this state."

An amendatory act, approved April 23, 1915 (P. L. 1915, p. 745; 1 Supp. Comp. Stat. N. J. p. 1542), repeated the provision last quoted, and made no change in the act pertinent to the questions here presented.

It is this method of assessment in the case of nonresident decedents which is the subject-matter in controversy.

James McDonald died January 13, 1915, owning stock in the Standard Oil Company, a New Jersey corporation, valued at \$1,114,965, leaving an entire estate of \$3,969,333.25, which included some real estate in the state of Idaho. Of the entire estate, \$279,813.17 went to pay debts and expenses of administration. Mr. McDonald was a citizen of the United States and a resident of the District of Columbia, and left a will and a codicil which were admitted to probate by the Supreme Court of that District. The executors are Lawrence Maxwell, a citizen of Ohio, and the Fulton Trust Company, a New York corporation. The principal beneficiaries under the will are citizens and residents of states of the United States other than the state of New Jersey. Under the will the wife takes by specific legacies; the other beneficiaries are specific and general legatees not related to the deceased and a son and two grandchildren, who take the residuary estate.

James J. Hill died May 29, 1916, intestate, a resident \*and citizen of the state of Minnesota, leaving a widow and nine children. Under the laws of Minnesota, the widow inherited one-third of the real estate and personal property, and each of the children two twenty-sevenths thereof. The entire estate descending amounted to \$53,814,762, which included real estate located outside of New Jersey, and principally in Minnesota and New York, valued at \$1,885,120. The only property the transfer of which was subject to taxation in New Jersey was stock in the Northern Securities Company, a New Jersey corporation, valued at \$2,317,564.68. The debts and administration expenses amounted to \$757,571.20.

The amount of the assessment in the McDonald Case was \$29,071.68. In the Hill Case the tax assessed amounted to \$67,

018.43. Following the statute, the tax was first ascertained on the entire estate as if it were the estate of a resident of the state of New Jersey, with all the decedent's property both real and personal located there; the tax was then apportioned and assessed in the proportion that the taxable New Jersey estate bore to the entire estate.

The thing complained of is that applying the apportionment formula fixed by the statute, in the cases under review, results in a greater tax on the transfer of property of the estates subject to the jurisdiction of New Jersey, than would be assessed for the transfer of an equal amount, in a similar manner, of property of a decedent who died a resident of New Jersey. The cause of this inequality is said to arise because of imposing the graduated tax, provided by the statute, upon estates so large as these. If a resident, in the case of a wife or children, the first \$5,000 of property is exempt, the next \$45,000 is taxed at the rate of 1 per cent., the next \$100,000 at the rate of 1½ per cent., the next \$100,000 at the rate of 2 per cent., and the remainder at the rate of 3 per cent. The contention is that, applying the apportionment rule provided in the case of nonresident estates, a larger amount of tax is assessed.

#### \*535

\*The correctness of the figures deduced from the application of the statute as made by the counsel for plaintiff in error is contested, but in our view the differences are unimportant, unless the state is bound to apply the same rule to the transmission of both classes of estates.

Counsel for plaintiffs in error sum up their objections to the statute, based on the federal Constitution, as follows:

(1) It taxes the estates of nonresidents more than those of residents, and therefore gives to residents privileges and immunities denied to nonresidents.

(2) It provides for a tax which bears unequally, and therefore is not imposed upon a uniform rule, and it therefore denies to nonresidents the equal protection of the laws.

(3) It taxes the transfer of a nonresident's property over which the state of New Jersey has no jurisdiction while it expressly omits like property of residents, that is, real estate without the state, and thereby deprives the nonresident of his property without due process of law.

[1] Before taking up these objections it is necessary to briefly consider the nature of the tax. In *Carr v. Edwards*, 84 N. J. Law, 667, 87 Atl. 132, it was held by the New Jersey Court of Errors and Appeals to be a tax upon the special right, the creation of the statute, of an executor or administrator of a nonresident decedent to succeed to property having its situs in New Jersey. Of section 12, as it stood in the original act of 1909, the court said:



"That section contains nothing to indicate that it is not the succession of the New Jersey representative that is meant to be taxed. It is true that the tax is not necessarily 5 per cent. upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state. The reason for adopting this provision was to make sure that the rate of tax-

\*536

ation in case of nonresident decedents \*should equal but not exceed the rate imposed in the case of resident decedents. \* \* \*

"In the case of the estates of nonresident decedents, it is open for the law of the domicile to provide, as testators sometimes do, that such taxes shall be a general charge against the estate. Our Legislature must be assumed to have had in mind its lack of jurisdiction over legacies under a nonresident's will, and in order to protect the New Jersey executor, administrator or trustee who paid the tax, authorized its deduction from 'property for distribution.' This phrase suffices to reach not only a distributive share of a resident's estate in the case of intestacy, but the whole of the New Jersey property of a nonresident when turned over to the executor or administrator at the domicile of the decedent. The provision for both cases—legacies and property for distribution—demonstrates that the Legislature did not mean to provide, as counsel contends, for a legacy duty only."

This language correctly characterizes the nature and effect of the tax as imposed under the amendment of 1914; but that act, under which the present cases arise, instead of reaching "the whole of the New Jersey property of a nonresident when turned over to the executor or administrator at the domicile of the decedent," now confines the transfer tax upon the property of nonresident decedents to real estate and tangible personal property within the state, the stock of New Jersey corporations, and the stock of national banks located within the state.

The tax is, then, one upon the transfer of property in New Jersey, to be paid upon turning it over to the administrator or executor at the domicile of the decedent. That transfers of this nature are within the taxing power of the state, and that taxes may be assessed upon such rights owing their existence to local laws, and to them alone, is not disputed. The right to inherit property, or to receive it under testamentary disposition, has

\*537

been so frequently \*held to be the creation of statutory law, that it is quite unnecessary to cite the decisions which have maintained the principle. While this is confessedly true, the assessment of such taxes is, of course, subject to applicable limitations of the state and federal Constitutions; it is with the latter class only that this court has to do.

[2-4] (1) Taking up, then, the objections raised under the federal Constitution, it is said that the law (a) denies to citizens of

other states the privileges and immunities granted to citizens of the state of New Jersey, in violation of paragraph 1, § 2, art. 4, of the federal Constitution, which reads, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" (b) abridges the privileges and immunities of plaintiffs in error, the deceased persons whom they represent, and those taking by will or intestacy under them, as citizens of the United States, in contravention of section 1 of the Fourteenth Amendment.

The provision quoted from article 4 of the Constitution was intended to prevent discrimination by the several states against citizens of other states in respect of the fundamental privileges of citizenship. As is said by Judge Cooley in his Constitutional Limitations (7th Ed.) p. 569:

"It appears to be conceded that the Constitution secures in each state to the citizens of all other states the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to." *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449.

The Fourteenth Amendment recognized a distinction between citizenship of the United

\*538

States and citizenship \*of one of the States. It provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

What those privileges and immunities were was under consideration in *Slaughterhouse Cases*, 16 Wall. 36, 72-79, 21 L. Ed. 394, where it was shown (16 Wall. 77, 78, 21 L. Ed. 394) that it was not the purpose of this amendment, by the declaration that no state should make or enforce any law which should abridge the privileges and immunities of citizens of the United States, to transfer from the states to the federal government the security and protection of those civil rights that inhere in state citizenship; and (16 Wall. 79, 21 L. Ed. 394) that the privileges and immunities of citizens of the United States thereby placed beyond abridgment by the states were those which owe their existence to the federal government, its national character, its constitution, or its laws. To the same effect is *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485.

We are unable to discover in the statute before us, which regulates and taxes the right to succeed to property in New Jersey upon the death of a nonresident owner, any infringement of the rights of citizenship el-



ther of the states or of the United States, secured by either of the constitutional provisions referred to. We have held that the protection that they afford to rights inherent in citizenship are not infringed by the taxation or transfer of property within the jurisdiction of a state passing by will or intestacy, where the decedent was a nonresident of the taxing state, although the entire succession was taxed in the state where he resided. *Blackstone v. Miller*, 188 U. S. 189, 207, 23 Sup. Ct. 277, 47 L. Ed. 439.

[5] Upon this point it is unnecessary to decide whether the case might not be rested on a much narrower ground. The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute, because the difference in the method

\*539

of taxation rests upon residence \*and not upon citizenship. *La Tourette v. McMaster*, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. Ed. 362.

[6] (2) It is next contended that the effect of including the property beyond the jurisdiction of the state in measuring the tax amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the state.

It is not to be disputed that, consistently with the federal Constitution, a state may not tax property beyond its territorial jurisdiction; but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City R. R. Co. v. Kansas*, 240 U. S. 227, 232, 36 Sup. Ct. 261, 60 L. Ed. 617. After deciding that the privilege tax, there involved, did not impose a burden upon interstate commerce, this court held that it was not in substance and effect a tax upon property beyond the state's jurisdiction, although a large amount of the property, which was referred to as a measure of the assessment, was situated outside of the state. In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so, within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the state exceeds its authority in imposing a tax upon a subject-matter

\*540

within its \*jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the state is held void. In cases of that character the attempted taxation must fail. *Looney v. Attorney General*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it.

[7] (3) It is further contended that the tax bears so unequally upon nonresidents as to deny to them the equal protection of the laws.

The subject of taxes of this character was given full consideration by this court in *Magoun v. Illinois*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, in which case a graded legacy and inheritance tax law of the state of Illinois was sustained. The statute exempted all estates valued at less than \$20,000, if passing to near relations, or at less than \$500 if passing to those more remote, made the rate of tax increasingly greater as the inheritances increased, and assessed it differently according to the relationship of the beneficiary to the testator or intestate. The statute was attacked as void under the equal protection clause of the Fourteenth Amendment, but was held to be valid. Of this class of taxes the court said (170 U. S. 288, 18 Sup. Ct. 596, 42 L. Ed. 1037):

"They [inheritance taxes] are based on two principles: (1) An inheritance tax is not one on property, but one on the succession. (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from

\*541

this power \*by the provisions of the respective state Constitutions requiring uniformity and equality of taxation."

And upon examining (170 U. S. 296, 297, 18 Sup. Ct. 594, 42 L. Ed. 1037) the classification upon which the provisions of the Illinois statute were based, the court found there was no denial of the equal protection of the laws either in discriminating between those lineally and those collaterally related to decedent, and those standing as strangers to the blood, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increased.

Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances. Under the statute, in the present case, the graduated taxes are lev-

fed equally upon all interests passing from nonresident testators or intestates. The tax is not upon property, but upon the privilege of succession, which the state may grant or withhold. It may deny it to some and give it to others. The state is dealing in this instance not with the transfer of the entire estate, but only with certain classes of property that are subject to the jurisdiction of the state. It must find some rule which will adequately deal with this situation. It has adopted that of the proportion of the local estate in certain property to the entire estate of the decedent. In making classification, which has been uniformly held to be within the power of the state, inequalities necessarily arise, for some classes are reached, and others omitted; but this has never been held to render such statutes unconstitutional. *Beers v. Glynn*, 211 U. S. 477, 29 Sup. Ct. 186, 53 L. Ed. 290. This principle has been recognized in a series of cases in this court. *Board of Education v. Illinois*, 203 U. S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314, 8 Ann. Cas. 157; *Campbell v. California*, 200 U. S. 87, 26 Sup. Ct. 182, 50 L. Ed. 382; *Keeney v. Comptroller of the State of New York*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139. It has been uniformly held that the Fourteenth Amendment does not deprive the states of the right to determine the limitations and restrictions upon the right to inherit property, but "at the most can only be held to restrain such an

\*542

exercise of power as would \*exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority." *Campbell v. California*, 200 U. S. 95, 26 Sup. Ct. 185, 50 L. Ed. 382. In upholding the validity of a graduated tax upon the transfer of personal property, to take effect upon the grantor's death, we said in *Keeney v. Comptroller of New York*, supra, 222 U. S. page 535, 32 Sup. Ct. 107, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139:

"The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the state, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the state of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch v. Reardon*, 204 U. S. 152, 159 [27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736]), that it must tax all transfers, or that all must be treated alike."

In order to invalidate this tax it must be held that the difference in the manner of assessing transmission of property by testators or intestates, as between resident and nonresident decedents, is so wholly arbitrary and unreasonable as to be beyond the legiti-

mate authority of the state. We are not prepared so to declare. The resident testator or intestate stands in a different relation to the state than does the nonresident. The resident's property is usually within the ready control of the state, and easily open to inspection and discovery for taxation purposes, by means quite different from those afforded in cases of local holdings of nonresident testators or intestates. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the state when transferred by will or intestacy; the transfer of the nonresident's estate is taxed only so far as his estate is located within the jurisdiction and only so far as it comes within the description of "real proper-

\*543

ty within this state, or of goods, wares, \*and merchandise within this state, or of shares of stock of corporations of this state, or of national banking associations located in this state." Simple contract debts owing by New Jersey debtors to nonresidents and some other kinds of property of nonresidents are exempt, although it is settled that, for the purpose of founding administration, simple contract debts are assets at the domicile of the debtor (*Wyman v. Halstead*, 109 U. S. 654, 656, 3 Sup. Ct. 417, 27 L. Ed. 1068), and that the state of the debtor's domicile may impose a succession tax (*Blackstone v. Miller*, 188 U. S. 189, 205, 23 Sup. Ct. 277, 47 L. Ed. 439; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 401, 37 Sup. Ct. 152, 61 L. Ed. 386).

The question of equal protection must be decided as between resident and nonresident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law.

In our opinion, there are substantial differences which within the rules settled by this court permit the classification which has been accomplished by this statute. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367, 35 Sup. Ct. 99, 59 L. Ed. 265, and cases cited.

Finding no error in the judgments of the Court of Errors and Appeals of the state of New Jersey, the same are

Affirmed.

Mr. Justice HOLMES (dissenting). Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power. That I understand to be the principle of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, and other



\*544

cases \*in 216 U. S. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278. New Jersey cannot tax the property of Hill or McDonald outside the State and cannot use her power over property within it to accomplish by indirection what she cannot do directly. It seems to me that that is what she is trying to do and therefore that the judgment of the Court of Errors and Appeals should be reversed.

It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way

as to secure equality between residents in New Jersey and those in other States.

New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone. In *Kansas City, Ft. Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 235, 36 Sup. Ct. 261, 60 L. Ed. 617, the State could have refused incorporation altogether and therefore could impose the carefully limited condition that was upheld.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS concur in the opinion that I express.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(250 U. S. 675)

No. 107. *POSTAL TELEGRAPH-CABLE COMPANY*, plaintiff in error, v. *CITY OF OIL CITY*. Oct. 6, 1919. In Error to the Superior Court of the State of Pennsylvania. Mr. Bynum E. Hinton, of Washington, D. C., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(250 U. S. 675)

No. 201. *John W. FROTHINGHAM et al.*, etc., appellants, v. *The UNITED STATES*. Oct. 6, 1919. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 641. Messrs. Simon Lyon and R. B. H. Lyon, both of Washington, D. C., for appellants. The Attorney General, for the United States. Dismissed, on motion of Mr. Simon Lyon for the appellants.

(250 U. S. 675)

No. 246. *Marion CALDWELL*, as State Supervisor of Oil Inspection, etc., appellant, v. *The MOORE OIL COMPANY et al.* Oct. 6, 1919. On Appeal from the District Court of the United States for the District of Indiana. Messrs. Ele Stansbury, of Indianapolis, Ind., and Will R. Wood, of Washington, D. C., for appellant. Mr. Charles D. Chamberlin, of Cleveland, Ohio, for respondents. Dismissed with costs, on motion of counsel for the appellant.

(250 U. S. 676)

No. 255. *Frank E. LOW*, plaintiff in error, v. *K. SUGAWA & COMPANY, Limited*. Oct. 6, 1919. In Error to the District Court of the United States for the Southern District of New York. Mr. Abram J. Rose, of New York City, for plaintiff in error. Mr. Henry Swartz, of New York City, for defendant in error. Dismissed, per stipulation.

(250 U. S. 676)

No. 275. *ARKANSAS CENTRAL RAILROAD COMPANY*, plaintiff in error, v. *W. L. GOAD*. Oct. 6, 1919. In Error to the Supreme Court of the State of Arkansas. For opinion below, see 206 S. W. 901. Mr. Thomas B. Pryor, of Ft. Smith, Ark., for plaintiff in error. Dismissed, per stipulation.

(250 U. S. 676)

No. 368. *J. K. LUMBER COMPANY*, plaintiff in error, v. *E. P. ASH*. Oct. 6, 1919. In Error to the Supreme Court of the State of Washington. For opinion below, see 176 Pac. 550. Messrs. Harrison G. Platt and Robert Treat Platt, both of Portland, Or., for plaintiff in error. Mr. Fred Miller, of Spokane, Wash., for defendant in error. Dismissed with costs on motion of counsel for the plaintiff in error.

(250 U. S. 676)

No. 398. *GREAT LAKES DREDGE & DOCK COMPANY*, petitioner, v. *EASTERN STEAMSHIP CORPORATION*. Oct. 6, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit. For opinion below, see 256 Fed. 497. Mr. Charles E. Kremer, of Chicago, Ill., for petitioner. Dismissed, on motion of counsel for the petitioner.

(250 U. S. 676)

No. 428. *The ALABAMA & VICKSBURG RAILWAY COMPANY et al.*, plaintiffs in error, v. *W. W. BEARD*. Oct. 6, 1919. In Error to the Supreme Court of the State of Mississippi. For opinion below, see 81 South. 14. Messrs. J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., and Robert H. Thompson, of Jackson, Miss., for plaintiffs in error. Messrs. Marcellus Green and Garner



Wynn Green, both of Jackson, Miss., W. J. Lamb, of Corinth, Miss., and N. Vick Robbins, of Vicksburg, Miss., for defendant in error. Writ of error and petition for writ of certiorari dismissed, per stipulation.

No. —, Original. The STATE OF NEW MEXICO, complainant, v. The STATE OF COLORADO. Oct. 13, 1919. Motion for leave to file bill of complaint herein granted, and process ordered to issue returnable on Monday, March 1 next.

No. 73. MARYLAND CASUALTY COMPANY, appellant, v. The UNITED STATES. Oct. 13, 1919. Messrs. A. R. Serven and Burt E. Barlow, both of Washington, D. C., for appellant. The Attorney General, for the United States. Motion to remand this cause for further findings of fact granted.

No. 85. Sue Erskine NEWMAN, administratrix, etc., et al., appellants, v. Ida M. MOYERS et al., etc.; and

No. 86. William G. McADOO, Secretary of the Treasury, et al., appellants, v. De Forest L. ORMES, administrator, etc. Oct. 13, 1919. The Attorney General, for appellants. Motion to substitute as one of the appellants Carter Glass, present Secretary of the Treasury, in place of William G. McAdoo, former Secretary of the Treasury, submitted by Mr. Solicitor General King for the appellants, and motion granted.

No. 168. Joseph W. NICHOLS, appellant, v. The UNITED STATES. Oct. 13, 1919. For opinion below, see 53 Ct. Cl. 463. Messrs. L. T. Michener, of Washington, D. C., and William E. Russell, of New York City, for appellant. The Attorney General, for the United States. Motion to remand this cause for further findings of fact granted, and the Court of Claims is directed to set aside its judgment and reopen the case for further testimony and additional findings of fact.

No. 260. George C. BEIDLER, appellant, v. The UNITED STATES. Oct. 13, 1919. Mr. Frank S. Appleman, of Washington, D. C., for appellant. The Attorney General, for the United States. Motion for a writ of certiorari or to remand this cause for further findings of fact denied.

(250 U. S. 651)

No. 276, October term, 1918. Richard H. DANA, individually, plaintiff in error, v. Richard H. DANA, executor, etc., et al. Oct. 13, 1919. See, also, 250 U. S. 220, 39 Sup. Ct. 449, 63 L. Ed. 947. Mr. Hollis R. Bailey, of Boston, Mass., for plaintiff in error. Mr. Wm. Harold Hitchcock, of Boston, Mass., for defendants in error. Motion to stay mandate and to amend proceedings into proceedings as on writ of certiorari denied.

No. 305. The NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. Isabel H. JOHNSON; and

No. 306. NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, v. A. M. MILLER, administrator, etc. Oct. 13, 1919. Messrs. George Lines, of Milwaukee, Wis., and George B. Young, of Montpelier, Vt., for petitioners. Motion to bring up the entire records and cases denied.

(250 U. S. 658)

No. 371. Daniel Curry CAMPBELL, petitioner, v. MARYLAND CASUALTY COMPANY. Oct. 13, 1919. For opinion below, see 255 Fed. 437, 166 C. C. A. 513. Messrs. A. H. & Roswell King and H. L. Anderson, all of Jacksonville, Fla., for petitioner. Messrs. F. P. Fleming, of Jacksonville, Fla., Walter L. Clark, of Baltimore, Md., and William C. Prentiss, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 659)

No. 381. HOUSTON OIL COMPANY OF TEXAS, petitioner, v. Mrs. M. J. BROWN. Oct. 13, 1919. For opinion below, see 202 S. W. 102. Messrs. H. O. Head, of Sherman, Tex., and Thomas M. Kennerly, of Houston, Tex. (Messrs. Jesse J. Lee and Kennerly, Williams, Lee & Hill, all of Houston, of counsel), for petitioner. Petition for a writ of certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas denied.

(250 U. S. 659)

No. 383. James B. ROBERTS, administrator, etc., petitioner, v. TENNESSEE COAL, IRON & RAILROAD COMPANY. Oct. 13, 1919. For opinion below, see 255 Fed. 469, 166 C. C. A. 545. Mr. W. A. Denson, of Birmingham, Ala. (Mr. Hannis Taylor, of Washington, D. C., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 659)

No. 384. D. M. HARDY et al., petitioners, v. The UNITED STATES of America. Oct. 13, 1919. For opinion below, see 256 Fed. 284. Messrs. William H. Atwell, of Dallas, Tex., and J. H. Barwise, Jr., of Ft. Worth, Tex., for petitioners. The Attorney General and Mr. La Rue Brown, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 659)

No. 389. Isidore S. WORKIN et al., plaintiffs in error, v. The UNITED STATES of America. Oct. 13, 1919. For opinion below, see 260 Fed. 137. Mr. Lawrence B. Cohen, of New York City, for plaintiffs in error. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 677)

No. 392. Frederick SCHREIBER et al., etc., petitioners, v. The GERMAN EVANGELICAL PROTESTANT CONGREGATION OF THE CHURCH OF THE HOLY GHOST et al.

Oct. 13, 1919. For opinion below, see 209 S. W. 914. Mr. Lon O. Hocker, of St. Louis, Mo., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Missouri dismissed, on motion of counsel for the petitioner.

(250 U. S. 659)

No. 396. **ERIE RAILROAD COMPANY**, petitioner, v. **Timothy KIRBY**. Oct. 13, 1919. For opinion below, see 172 N. Y. Supp. 901. Messrs. Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (Mr. Adelbert Moot, of Buffalo, N. Y., of counsel), for petitioner. Mr. Thomas Burke, of Buffalo, N. Y., for respondent. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Department, State of New York, denied.

(250 U. S. 660)

No. 403. **NORDYKE and MARMON COMPANY**, petitioner, v. **CITY OF INDIANAPOLIS**. Oct. 13, 1919. Messrs. Clarence E. Weir and Charles W. Richards, both of Indianapolis, Ind., for petitioner. Messrs. Samuel Ashby, Thomas D. Stevenson, Harry E. Yockey, and Dixon H. Bynum, all of Indianapolis, Ind., for respondent. Petition for a writ of certiorari to the Superior Court of Marion County, State of Indiana, denied.

(250 U. S. 660)

No. 404. **H. LAUTER COMPANY**, petitioner, v. **CITY OF INDIANAPOLIS**. Oct. 13, 1919. Messrs. Clarence E. Weir and Charles W. Richards, both of Indianapolis, Ind., for petitioner. Petition for a writ of certiorari to the Superior Court of Marion County, State of Indiana, denied.

(250 U. S. 660)

No. 414. **William DODGE**, petitioner, v. **The UNITED STATES of America**. Oct. 13, 1919. For opinion below, see 258 Fed. 300. Messrs. Irving M. Weiss and Eustace Reynolds, both of Buffalo, N. Y., for petitioner. The Attorney General and Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 660)

No. 417. **The VIRGINIAN RAILWAY COMPANY**, petitioner, v. **Vernon HALSTED**, who sues by **Nora Halsted**, his next friend. Oct. 13, 1919. For opinion below, see 258 Fed. 428. Mr. Walter H. Taylor, of Norfolk, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 655)

No. 419. **E. Hilton JACKSON**, receiver, etc., petitioner, v. **John Lewis SMITH et al.** Oct. 13, 1919. For opinion below, see 48 App. D. C. 565. Mr. W. W. Millan, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(250 U. S. 661)

No. 420. **James A. KEOWN**, petitioner, v. **A. Francis HAYDEN**, administrator, etc. Oct. 13, 1919. For opinion below, see 232 Mass. 259,

122 N. E. 264. Mr. James A. Keown, of Lynn, Mass., pro se. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied.

(250 U. S. 655)

No. 421. **AMERICAN STEEL FOUNDRIES**, petitioner, v. **James T. NEWTON**, Commissioner of Patents. Oct. 13, 1919. For opinion below, see 258 Fed. 160. Mr. George L. Wilkinson, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(250 U. S. 661)

No. 423. **CHICAGO & NORTH WESTERN RAILWAY COMPANY**, plaintiff in error, v. **Herman VAN DE ZANDE**. Oct. 13, 1919. For opinion below, see 168 Wis. 628, 170 N. W. 259. Mr. R. N. Van Doren, of Merrill, Wis., for plaintiff in error. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied.

(250 U. S. 661)

No. 429. **Joseph M. COLDWELL**, petitioner, v. **The UNITED STATES of America**. Oct. 13, 1919. For opinion below, see 256 Fed. 805. Mr. Walter Nelles, of New York City (Messrs. Anthony V. Pettine and Luigi De Pasquale, both of Providence, R. I., of counsel), for petitioner. The Attorney General and Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(250 U. S. 661)

No. 430. **Wilhelm SCHUMANN**, petitioner, v. **The UNITED STATES of America**. Oct. 13, 1919. For opinion below, see 258 Fed. 233. Mr. C. H. Van Law, of Marshalltown, Iowa, for petitioner. The Attorney General and Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 661)

No. 431. **The CHESAPEAKE & POTOMAC TELEPHONE COMPANY**, petitioner, v. **J. Robert SOMMERVILLE**. Oct. 13, 1919. For opinion below, see 258 Fed. 147. Mr. Henry B. Macfarland, of Washington, D. C., for petitioner. Mr. George E. Sullivan, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(250 U. S. 662)

No. 432. **Clarence W. TURNER**, petitioner, v. **Fred E. TURNER**. Oct. 13, 1919. For opinion below, see 180 Pac. 248. Messrs. A. A. Davidson and Preston C. West, both of Tulsa, for petitioner. Messrs. Richard W. Stout, of Asbury Park, N. J., and James W. Zevely and James M. Givens, both of Muskogee, Okl., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(250 U. S. 662)

No. 433. **Catherine NEIDLEIN**, as administratrix, etc., petitioner, v. **SOUTHERN PACIFIC COMPANY**. Oct. 13, 1919. For opin-



ion below, see 179 Pac. 191. See, also, 40 Sup. Ct. 11, 64 L. Ed. —. Mr. Theodore A. Bell, of San Francisco, Cal. (Mr. Stanley D. Willis, of Washington, D. C., of counsel), for petitioner. Messrs. Robt. T. Devlin and Wm. H. Devlin, both of Sacramento, Cal., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

No. 433. Catherine NEIDLEIN, as administratrix of the estate of Francis J. Neidlein, deceased, petitioner, v. SOUTHERN PACIFIC COMPANY. Oct. 13, 1919. See, also, 250 U. S. 662, 40 Sup. Ct. 10, 63 L. Ed. 1195. Mr. Theodore A. Bell, of San Francisco, Cal. (Mr. Stanley D. Willis, of Washington, D. C., of counsel), for petitioner. Messrs. Robt. T. Devlin and Wm. H. Devlin, both of Sacramento, Cal., for respondent. Motion for an order directing the clerk to file petition for writ of certiorari as of June 27, 1919, denied.

(250 U. S. 662)

No. 436. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, petitioner, v. Edith A. LESTER. Oct. 13, 1919. For opinion below, see 257 Fed. 225. Messrs. R. M. Haines, F. S. Dunshee, and J. L. Brody, all of Des Moines, Iowa (Messrs. S. D. Bishop, of Lawrence, Kan., and Fred P. Carr, of Des Moines, Iowa, of counsel), for petitioner. Messrs. M. A. Gorrill and Henry H. Asher, both of Lawrence, Kan., and Leonard S. Ferry, of Topeka, Kan., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 662)

No. 439. NATIONAL CAN COMPANY, petitioner, v. Olin S. FELLOWS. Oct. 13, 1919. For opinion below, see 257 Fed. 970. Mr. Clement R. Stickney, of Detroit, Mich., for petitioner. Mr. William E. Moss, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 663)

No. 440. Mrs. Donie MORRISON, administratrix, etc., petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. Oct. 13, 1919. Messrs. Jno. J. Vertrees, of Nashville, Tenn., and H. N. Leech, of Clarksville, Tenn., for petitioner. Messrs. Michael Savage, of Clarksville, Tenn., and Jno. B. Keeble and Ed. T. Seay, both of Nashville, Tenn., for defendant. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(250 U. S. 663)

No. 442. STANDARD SILK DYEING COMPANY, petitioner, v. The ROESSLER & HASSLACHER CHEMICAL COMPANY. Oct. 13, 1919. For opinion below, see 254 Fed. 777, 166 C. C. A. 223. Mr. Hugh Gordon Miller, of New York City (Mr. Homer S. Cummings, of Stamford, Conn., of counsel), for petitioner. Messrs. Creevey & Rogers, of New York City (Messrs. Garrard Glenn and William B. Walsh, both of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 443. AMERICAN CAR & FOUNDRY COMPANY, petitioner, v. Saropia ROCHA. Oct. 13, 1919. For opinion below, see 257 Fed. 297. Messrs. M. F. Watts, Wm. R. Gentry and Edwin W. Lee, all of St. Louis, Mo. (Messrs. G. A. Orth, of New York City, and John O. H. Pitney and John R. Hardin, both of Newark, N. J., of counsel), for petitioner. Messrs. Thomas Bond, Edward W. Foristel and Jesse T. Friday, all of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 663)

No. 447. G. A. VEDIN, petitioner, v. The UNITED STATES of America. Oct. 13, 1919. For opinion below, see 257 Fed. 550. Messrs. Wm. H. Chapman, of San Francisco, Cal., Leroy Tozier, of Fairbanks, Alaska, and De Journal & De Journal, of San Francisco, Cal., for petitioner. The Attorney General and Messrs. Robert P. Stewart, Asst. Atty. Gen. and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(250 U. S. 663)

No. 448. Edward D. STEGER et al., composing the firm of Steger & Company, petitioners, v. Mountford S. ORTH. Oct. 13, 1919. For opinion below, see 258 Fed. 619. Messrs. Joseph W. Bailey and William J. Hughes, both of Washington, D. C., and Addison S. Pratt, of New York City, for petitioners. Messrs. Thomas N. Rhinelander, Origen S. Seymour, and Alfred S. Barnard, all of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 664)

No. 450. James A. KEOWN, petitioner, v. Julia E. TRUDO et al. Oct. 13, 1919. Mr. James A. Keown, of Lynn, Mass., pro se. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

(250 U. S. 664)

No. 453. Parker STENNICK, trustee, etc., petitioner, v. Willard N. JONES et al. Oct. 13, 1919. For opinions below, see 252 Fed. 345, 164 C. C. A. 269; 256 Fed. 354; 258 Fed. 990. Messrs. Thomas Mannix and Guy L. Wallace, both of Portland, Or., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(250 U. S. 664)

No. 454. Sarah Chandler SHAPLEY, petitioner, v. George M. KLINE et al. Oct. 13, 1919. For opinion below, see 232 Mass. 506, 122 N. E. 641. Sarah Chandler Shapley, pro se. Mr. Henry A. Wyman, Atty. Gen. (Mr. Arthur Thad Smith, Asst. Atty. Gen., of counsel), for respondents. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied.

(250 U. S. 664)

No. 459. CONCRETE STEEL COMPANY, petitioner, v. George E. VANDENBURGH. Oct. 13, 1919. For opinion below, see 258 Fed. 143. Mr. Thomas J. Johnston, of New York



City (Messrs. L. E. Varney and Emery, Varney, Blair & Hoguet, all of New York City, of counsel), for petitioner. Mr. Carlos P. Griffin, of San Francisco, Cal. (Mr. O. Ellery Edwards, Jr., of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 665)

No. 463. Philip CHASS, petitioner, v. The UNITED STATES of America. Oct. 13, 1919. For opinion below, see 258 Fed. 911. Mr. Benjamin M. Weinberg, of Newark, N. J., for petitioner. Mr. Alex. C. King, Sol. Gen., of Atlanta, Ga., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 496. HARTFORD LIFE INSURANCE COMPANY, plaintiff in error, v. Rosa BARBER. Oct. 13, 1919. Mr. James C. Jones, of St. Louis, Mo., for plaintiff in error. Death of Rosa Barber, the defendant in error herein, suggested, and the appearance of Cecelia Blinco, administratrix of the estate of Rosa Barber, deceased, as defendant in error in this cause, filed and entered per stipulation of counsel and on motion of Mr. Henry G. Miller in behalf of counsel for the defendant in error.

No. 1014, October term, 1918. Philip F. DU PONT et al., petitioners, v. Pierre S. DU PONT et al. Oct. 13, 1919. For former decision, see 250 U. S. 642, 39 Sup. Ct. 492, 63 L. Ed. 1185, which denied certiorari to 256 Fed. 129, which affirmed decree 251 Fed. 937. Motion to reinstate the petition for a writ of certiorari herein denied.

(250 U. S. 677)

No. 361. Herman THEDEN et al., plaintiffs in error, v. The UNION PACIFIC RAILROAD COMPANY. Oct. 16, 1919. For opinion below, see 104 Kan. 289, 178 Pac. 441. Mr. L. W. Keplinger, of Kansas City, Kan., for plaintiff in error. In error to the Supreme Court of the State of Kansas. Dismissed with costs, on motion of counsel for the plaintiffs in error.

(250 U. S. 677)

No. 41. J. Eugene JORDAN, plaintiff in error, v. The BOARD OF MEDICAL EXAMINERS OF THE STATE OF WASHINGTON. Oct. 17, 1919. For opinions below, see 92 Wash. 234, 158 Pac. 982; 95 Wash. 700, 163 Pac. 925. Mr. Edward Judd, of Seattle, Wash., for plaintiff in error. Mr. W. V. Tanner, of Seattle, Wash., for defendant in error. In error to the Supreme Court of the State of Washington. Dismissed with costs, pursuant to the sixteenth rule, on motion of Mr. Blackburn Esterline for the defendant in error.

(250 U. S. 650, 665)

No. 13. William J. HOGARTY, plaintiff in error, v. PHILADELPHIA & READING RAILWAY COMPANY. Oct. 20, 1919. In Error to the Supreme Court of the State of Pennsylvania. For opinion below, see 255 Pa. 236, 99 Atl. 741. Messrs. Alexander Simpson, Jr.,

and Ira Jewell Williams, both of Philadelphia, Pa., for plaintiff in error. Mr. William Clarke Mason, of Philadelphia, Pa., for defendant in error.

PER CURIAM. The writ of error in this case is dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231. 36 Stat. 1156), as amended by section 2 of the act of September 6, 1916, c. 448, 39 Stat. 726 [Comp. St. § 1214].

The application, consented to by the parties, to convert nunc pro tunc the writ of error into a writ of certiorari, or to treat the writ of error as having the effect of a writ of certiorari, is also denied. See act of September 6, 1916, c. 448, § 7, 39 Stat. 728; Richard H. Dana, individually, v. Richard H. Dana, Executor, etc., 250 U. S. 651, 40 Sup. Ct. 9, 63 L. Ed. 1203, decided October 13, 1919.

No. 20. October term, 1918. The ARIZONA COPPER COMPANY, Limited, plaintiff in error, v. Joseph B. HAMMER; and

No. 21. October term, 1918. The ARIZONA COPPER COMPANY, plaintiff in error, v. Richard BRAY. Oct. 20, 1919. See, also, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058. Messrs. William C. McFarland, of Douglas, Ariz., John A. Garver, of New York City, and Ernest W. Lewis, of Phoenix, Ariz., for plaintiff in error. Messrs. Frank E. Curley, of Tucson, Ariz., L. Kearney, of Clifton, Ariz., and Frank H. Hereford, of Tucson, Ariz., for defendants in error. Motions to recall the mandates and amend the judgments denied.

(250 U. S. 651)

No. 175. ARMOUR & COMPANY et al., plaintiffs in error, v. The NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY et al. Oct. 20, 1919. In error to the Superior Court of the State of Rhode Island. For opinion below, see 103 Atl. 1031. Mr. Eugene A. Kingman, of Providence, R. I., for plaintiffs in error. Messrs. George H. Huddy, Jr., of Providence, R. I., and Edward G. Buckland, of New Haven, Conn., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; (2) Thomas v. Iowa, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782; Bowe v. Scott, 233 U. S. 658, 664, 665, 34 Sup. Ct. 769, 58 L. Ed. 1141; and see El Paso Sash & Door Co. v. Carraway, 245 U. S. 643, 38 Sup. Ct. 222, 62 L. Ed. 528; (3) Spies v. Illinois, 123 U. S. 131, 166, 8 Sup. Ct. 21, 22, 31 L. Ed. 80; Chapin v. Fye, 179 U. S. 127, 130, 21 Sup. Ct. 71, 45 L. Ed. 119.

(250 U. S. 672)

No. 422. M. Hampton TODD et al., Receivers etc., petitioners, v. Heulings LIPPINCOTT and Alfred J. Major, Receivers etc. Oct. 20, 1919. For opinion below, see 258 Fed. 205. Mr. J. H. Brinton, of Philadelphia, Pa., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third District denied.

(250 U. S. 665)

No. 452. KATHERINE KEVER, widow of George Kever, petitioner, v. PHILADELPHIA & READING COAL & IRON COMPANY. Oct. 20, 1919. For opinion below, see 260 Fed. 534. Mr. Albert P. Massey, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 650, 665)

No. 462. ERIE RAILROAD COMPANY, plaintiff in error, v. James John HISSEY for the use of John A. Chapman et al. Oct. 20, 1919. In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 [Comp. St. § 1214]. Petition for certiorari and motion for leave to amend petition for removal denied.

(250 U. S. 665)

No. 475. NATIONAL SURETY COMPANY et al., petitioners, v. The COMMONWEALTH OF VIRGINIA at relation and for benefit of The WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY. Oct. 20, 1919. For opinion below, see 99 S. E. 657. Messrs. Wilton J. Lambert, J. J. Darlington, Frank J. Hogan, and Rudolph H. Yeatman, all of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(250 U. S. 665)

No. 477. WYSONG & MILES COMPANY et al., plaintiffs in error, v. PLANTERS NATIONAL BANK OF RICHMOND, VA. Oct. 20, 1919. For opinion below, see 99 S. E. 199. Mr. Thomas J. Jerome, of Greensboro, N. C., for plaintiffs in error. Mr. Garland S. Ferguson, Jr., of Greensboro, N. C., for defendant in error. Petition for a writ of certiorari herein denied.

(250 U. S. 666)

No. 478. WYSONG & MILES COMPANY et al., plaintiffs in error, v. BANK OF NORTH AMERICA, PHILADELPHIA, PA. Oct. 20, 1919. For opinion below, see 99 S. E. 207. Mr. Thomas J. Jerome, of Greensboro, N. C., for plaintiffs in error. Mr. Garland S. Ferguson, Jr., of Greensboro, N. C., for defendant in error. Petition for a writ of certiorari herein denied.

(250 U. S. 666)

No. 480. KEITH LUMBER COMPANY, petitioner, v. HOUSTON OIL COMPANY OF TEXAS et al. Oct. 20, 1919. For opinion below, see 257 Fed. 1. Mr. H. M. Garwood, of Houston, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 666)

No. 481. FIEGER-AUSTIN DREDGING COMPANY, petitioner, v. OTTO MARMET COAL & MINING COMPANY. Oct. 20, 1919. For opinion below, see 259 Fed. 435. Mr. Low-

rie C. Barton, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 672)

No. 483. AMERICAN DISTRIBUTING COMPANY, petitioner, v. HAYES WHEEL COMPANY. Oct. 20, 1919. For opinion below, see 257 Fed. 881. Mr. Thomas E. Barkworth, of Jackson, Mich., for plaintiff in error. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 666)

No. 485. ERIE RAILROAD COMPANY, petitioner, v. Jacob SCHLEENBAKER. Oct. 20, 1919. For opinion below, see 257 Fed. 667. Mr. J. Paul Lamb, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 667)

No. 448. Anna RUST and William Rust, petitioners, v. FIRST NATIONAL BANK OF SWEETWATER, TEXAS. Oct. 20, 1919. For opinion below, see 257 Fed. 29. Mr. Henry C. Coke, of Dallas, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 655)

No. 489. SILVER KING COALITION MINES COMPANY, petitioner, v. CONKLING MINING COMPANY. Oct. 20, 1919. For opinion below, see 230 Fed. 553. Messrs. Curtis H. Lindley, of San Francisco, Cal., W. H. Dickson, of Denver, Colo., and A. C. Ellis, Jr., and Thomas Marioneaux, both of Salt Lake City, Utah, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(250 U. S. 667)

No. 490. Milton A. MILLER, as Collector of Internal Revenue, etc., petitioner, v. Matilda M. GEARIN. Oct. 20, 1919. For opinion below, see 258 Fed. 225. The Attorney General, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(250 U. S. 657)

No. 492. FEDERAL TRADE COMMISSION, petitioner, v. Anderson GRATZ and Benjamin Gratz, copartners, etc., et al. Oct. 20, 1919. For opinion below, see 258 Fed. 314. Messrs. Alexander C. King, of Atlanta, Ga., Claude R. Porter, of Centerville, Iowa, and Huston Thompson, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(250 U. S. 667)

No. 495. The ANTERO & LOST PARK RESERVOIR COMPANY et al., petitioners, v. GAS SECURITIES COMPANY et al. Oct. 20, 1919. For opinion below, see 259 Fed. 423. Messrs. L. F. Twitchell and Irving B. Melville, both of Denver, Colo., for petitioners. Peti-



tion for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 667)

No. 493. The NASHVILLE, CHATTA-NOOGA & ST. LOUIS RAILWAY, petitioner, v. L. J. AUSTIN. Oct. 20, 1919. Messrs. Fitzgerald Hall and Montague S. Ross, both of Nashville, Tenn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(250 U. S. 656)

No. 499. The PENN MUTUAL LIFE INSURANCE COMPANY, petitioner, v. Ephraim LEDERER, Collector of Internal Revenue, etc. Oct. 20, 1919. For opinion below, see 258 Fed. 81. Mr. George Wharton Pepper, of Philadelphia, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(250 U. S. 668)

No. 501. Truman A. KETCHUM, appellant, v. PLEASANT VALLEY COAL COMPANY and Guaranty Trust Company. Oct. 20, 1919. For opinion below, see 257 Fed. 274. Messrs. Charles C. Dey and E. A. Walton, both of Salt Lake City, Utah, for appellant. Petition for a writ of certiorari herein denied.

(250 U. S. 656)

No. 506. Edward WHITE, Commissioner of Immigration for the Port of San Francisco, petitioner, v. CHIN FONG. Oct. 20, 1919. For opinion below, see 258 Fed. 849. The Attorney General, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(250 U. S. 668)

No. 507. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. PHILADELPHIA, GERMANTOWN & NORRISTOWN RAILROAD COMPANY. Oct. 20, 1919. For opinion below, see 108 Atl. 528. Mr. Abraham M. Beitler, of Philadelphia, Pa., for petitioner. Mr. James Wilson Bayard, of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(250 U. S. 668)

No. 509. COLEMAN & COMPANY, petitioner, v. TAWAS COMPANY, Inc. Oct. 20, 1919. For opinion below, see 260 Fed. 543. Mr. Jacob J. Lesser, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 668)

No. 510. William A. JAMISON et al., trading as Jay Street Terminal, petitioner, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY et al. Oct. 20, 1919. For opinion below, see 258 Fed. 923. Mr. D. Roger Englar, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 656)

No. 511. Guiseppe CAVALLARO, petitioner, v. Steamship CARLO POMA, her engines, etc., Kingdom of Italy, claimant. Oct. 20, 1919. For opinion below, see 259 Fed. 369. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(250 U. S. 668)

No. 512. The PRUDENTIAL INSURANCE COMPANY OF AMERICA, petitioner, v. George W. RAGAN, Administrator, etc. Oct. 20, 1919. For opinion below, see 184 Ky. 359, 212 S. W. 123. Mr. Wm. Marshall Bullitt, of Louisville, Ky., for petitioner. Mr. Robt. D. Vance, of Henderson, Ky. (Mr. S. O. Heilbronner, of Henderson, Ky., of counsel), for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied.

(250 U. S. 672)

No. 514. Howard W. SHOWALTER, petitioner, v. The UNITED STATES of America. Oct. 20, 1919. For opinion below, see 260 Fed. 719. Messrs. John A. Howard and J. M. Ritz, both of Wheeling, W. Va., for petitioner. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 669)

No. 515. Frederick O. BALCOM, petitioner, v. The UNITED STATES of America. Oct. 20, 1919. For opinion below, see 259 Fed. 779. Messrs. Washington R. Prescott, George F. O'Shaunessy, and William M. P. Bowen, all of Providence, R. I., and Jesse C. Adkins, of Washington, D. C., for petitioner. Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(250 U. S. 669)

No. 517. CRENSHAW BROS. & SAF-FOLD, a copartnership, etc., petitioner, v. SOUTHERN PACIFIC COMPANY. Oct. 20, 1919. For opinion below, see 183 Pac. 208, which denied motion to recall remittitur and correct judgment 181 Pac. 252. Mr. L. T. Hatfield, of Sacramento, Cal., for petitioner. Mr. Henley C. Booth, of San Francisco, Cal., for respondent. Petition for a writ of certiorari to the District Court of Appeal, Third Appellate District, of the State of California, denied.

(250 U. S. 669)

No. 518. The T. L. SMITH COMPANY et al., petitioners, v. The CEMENT TILE MACHINERY COMPANY. Oct. 20, 1919. For opinion below, see 257 Fed. 423. Messrs. Thomas F. Sheridan, George L. Wilkinson, and Walter A. Scott, all of Chicago, Ill., for petitioners. Mr. John E. Stryker, of St. Paul, Minn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 672)

No. 519. Chauncey J. HAMLIN et al., as Surviving Executors, etc., et al., petitioners, v. Mary K. WELLINGTON, Individually and as Executrix, etc., et al. Oct. 20, 1919. Messrs.



O'Brian, Donovan, Goodyear & Hellings, of Buffalo, N. Y. (Mr. Dana B. Hellings, of Buffalo, N. Y., of counsel), for petitioners. Mr. G. B. Wellington, of Troy, N. Y., for respondent. Petition for a writ of certiorari to the Surrogate's Court of Erie County, State of New York, denied.

(250 U. S. 656)

No. 525. **WORTH BROTHERS COMPANY**, petitioner, v. **Ephraim LEDERER**, Collector of Internal Revenue, etc. Oct. 20, 1919. For opinion below, see 258 Fed. 533. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(250 U. S. 657)

No. 526. **FORGED STEEL WHEEL COMPANY**, petitioner, v. **C. G. LEWELLYN**, Collector of Internal Revenue, etc. Oct. 20, 1919. For opinion below, see 258 Fed. 533. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(250 U. S. 669)

No. 527. **Lewis A. STEBBINS**, petitioner, v. **A. F. SELIG**. Oct. 20, 1919. For opinion below, see 257 Fed. 230. Messrs. L. A. Stebbins, of Chicago, Ill., and W. H. Sears, of Ranger, Ill. (Messrs. X. O. Pindall, of Little Rock, Ark., and Paule E. Price, of Chicago, Ill., of counsel), for petitioner. Messrs. Thos. S. Buzbee, George B. Pugh, and Harvey T. Harrison, of Little Rock, Ark., and O. M. Young, of Stuttgart, Ark., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 670)

No. 528. **The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY**, petitioner, v. **INDUSTRIAL COMMISSION OF ILLINOIS** et al. Oct. 20, 1919. For opinion below, see 123 N. E. 278. Mr. W. F. Dickinson, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(250 U. S. 670)

No. 529. **The TOLEDO & OHIO CENTRAL RAILWAY COMPANY**, petitioner, v. **The PUBLIC UTILITIES COMMISSION OF OHIO**. Oct. 20, 1919. For opinion below, see 126 N. E. 400. Messrs. Doyle & Lewis, of Toledo, Ohio (Messrs. Frank S. Lewis and Frederick W. Gaines, both of Toledo, Ohio, of counsel), for petitioner. Mr. John G. Price, of Columbus, Ohio (Mr. H. B. Arnold, of Columbus, Ohio, of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(250 U. S. 673)

No. 533. **George W. BELVIN**, petitioner, v. **The UNITED STATES OF AMERICA**. Oct. 20, 1919. For opinion below, see 260 Fed. 455, 171 C. C. A. 281. Mr. Nathaniel T. Green, of Norfolk, Va., for petitioner. Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 657)

No. 535. **CARBON STEEL COMPANY**, petitioner, v. **C. G. LEWELLYN**, Collector of Internal Revenue, etc. Oct. 20, 1919. For opinion below, see 258 Fed. 533. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(250 U. S. 657)

No. 536. **STARK BROS. NURSERIES & ORCHARDS COMPANY**, petitioner, v. **William P. STARK** and **William H. Stark**, Trustees, etc. Oct. 20, 1919. For opinion below, see 257 Fed. 9. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(250 U. S. 670)

No. 538. **Clay Arthur PIERCE** et al., appellants, v. **The UNITED STATES of America**. Oct. 20, 1919. For opinions below, see 257 Fed. 514; 260 Fed. 158. Messrs. Thomas W. White, of St. Louis, Mo., and Levi Cooke, of Washington, D. C. (Messrs. S. W. Fordyce, Jr., John H. Holliday, and Albert D. Norton, all of St. Louis, Mo., of counsel), for petitioners. Messrs. Alex. C. King, Sol. Gen., of Atlanta, Ga., and A. F. Myers, of Washington, D. C., for the United States. Petition for a writ of certiorari herein denied.

(250 U. S. 670)

No. 539. **The NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY**, petitioner, v. **Clinton F. PUGH**. Oct. 20, 1919. Messrs. M. B. and H. H. Johnson, of Cleveland, Ohio (Messrs. William D. Turner, H. D. Howe, and John T. Scott, all of Cleveland, Ohio, of counsel), for petitioner. Messrs. Payer, Winch, Minshall & Karch, of Cleveland, Ohio, for respondent. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District, of the State of Ohio, denied.

(250 U. S. 671)

No. 542. **The CITY OF NEW YORK**, petitioner, v. **CONSOLIDATED GAS COMPANY OF NEW YORK** et al. Oct. 20, 1919. For opinion below, see 260 Fed. 1022. Mr. William P. Burr, of New York City, for petitioner. Mr. John A. Garver, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 671)

No. 545. **PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY**, petitioner, v. **Ellsworth G. COLE**. Oct. 20, 1919. For opinion below, see 260 Fed. 357. Messrs. Andrew Squire and Thomas M. Kirby, both of Cleveland, Ohio (Messrs. Squire, Sanders & Dempsey, of Cleveland, Ohio, of counsel), for petitioner. Mr. Albert E. Powell, of Cleveland, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 671)

No. 546. **Benjamin FRIEDMAN**, petitioner, v. **The UNITED STATES of America**. Oct. 20, 1919. For opinion below, see 260 Fed. 388. Mr. Benjamin Friedman, pro se. Mr. Alex C.

King, Sol. Gen., of Atlanta, Ga., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 671)

No. 550. Raymond A. KELLY, Administrator, etc., petitioner, v. Herbert B. McKEOWN. Oct. 20, 1919. For opinion below, see 139 Minn. 285, 166 N. W. 329. Mr. John F. Kelly, of St. Paul, Minn., for petitioner. Mr. Trafford N. Jayne, of Minneapolis, Minn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(250 U. S. 673)

No. 556. SEABOARD AIR LINE RAILWAY COMPANY, petitioner, v. BALTIMORE TRUST COMPANY et al. Oct. 20, 1919. For opinion below, see 99 S. E. 867. Messrs. Jack J. Spalding and Daniel MacDougald, both of Atlanta, Ga., and E. S. Ault, of Cedartown, Ga. (Messrs. King & Spalding, of Atlanta, Ga., and E. S. Ault, of Cedartown, Ga., of counsel), for petitioner. Messrs. Cumming & Harper, of Augusta, Ga. (Messrs. Jos. B. Cumming and Bryan Cumming, both of Augusta, Ga., of counsel), for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied.

(250 U. S. 671)

No. 559. The COLUMBUS PACKING COMPANY, petitioner, v. The STATE OF OHIO on the relation of Hugo N. SCHLESINGER, Prosecuting Attorney, etc., et al. Oct. 20, 1919. Messrs. Smith W. Bennett and Ralph E. Westfall, both of Columbus, Ohio, for petitioner. Messrs. E. J. Hainer, of Lincoln, Neb., and Fred C. Rector, of Columbus, Ohio, for respondent Fairmont Creamery Co. Mr. Timothy S. Hogan, of Columbus, Ohio, for respondent Claude S. Chamberlain. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(250 U. S. 673)

No. 565. WHITE OAK FUEL COMPANY, petitioner, v. Bertram U. CARTER et al., co-partners, etc. Oct. 20, 1919. For opinion below, see 257 Fed. 54. Messrs. John P. Leahy, of St. Louis, Mo., and John V. Lee, of St. Louis, Mo., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 673)

No. 57. Julius WILBUR, plaintiff in error, v. The STATE OF OREGON. Oct. 23, 1919. In error to the Supreme Court of the State of Oregon. For opinion below, see 85 Or. 565, 167 Pac. 569, which denies rehearing of 85 Or. 565, 166 Pac. 51. Mr. Guy C. H. Corliss, of Portland, Or., for plaintiff in error. Mr. George M. Brown, of Roseburg, Or., for the State of Oregon. Dismissed, with costs, under Rule 16 (32

Sup. Ct. IX), on motion of Mr. Frederick S. Tyler in behalf of Mr. George M. Brown for the defendant in error.

(250 U. S. 678)

No. 45. Thomas S. HAYMOND, appellant, v. Anthony BOWEN et al. Oct. 27, 1919. Appeal from the District Court of the United States for the Northern District of West Virginia. Mr. John A. Howard, of Wheeling, W. Va., for appellant. Mr. Allison S. Fleming, of Fairmont, W. Va., for appellees. Dismissed with costs on motion of counsel for the appellant.

(250 U. S. 678)

No. 299. H. E. KIRCHNER, petitioner, v. The UNITED STATES of America. Oct. 27, 1919. On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 255 Fed. 301, 166 C. C. A. 471. Mr. J. W. Vandervort, of Parkersburg, W. Va., for petitioner. The Attorney General, for the United States. Dismissed on motion of Mr. Solicitor General King in behalf of counsel for the petitioner.

(250 U. S. 678)

No. 247. The UNITED STATES of America on the relation of Simon WEINER, plaintiff in error and appellant, v. Nathan GORDON et al., etc., et al. Oct. 27, 1919. In error to and appeal from the District Court of the United States for the Southern District of New York. Mr. Alexander S. Drescher, of Brooklyn, N. Y., for appellant. Dismissed with costs, on motion of Mr. Solicitor General King in behalf of counsel for the plaintiff in error and appellant.

(250 U. S. 658)

No. 395. A. L. BRACHT, petitioner, v. SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY. Oct. 27, 1919. For opinion below, see 200 Mo. App. 655, 209 S. W. 579. Mr. I. N. Watson, of Kansas City, Mo., for petitioner. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted.

(250 U. S. 673)

No. 451. David LAMAR and Henry B. Martin, plaintiffs in error, v. The UNITED STATES of America. Oct. 27, 1919. For opinion below, see 260 Fed. 561. Mr. Elijah N. Zoline, of New York City, for plaintiffs in error. The Attorney General, for the United States. Petition for a writ of certiorari herein denied.

(250 U. S. 673)

No. 487. The CUDAHY PACKING COMPANY, petitioner, v. Edward B. PRYOR, receiver, etc. Oct. 27, 1919. Messrs. George T. Buckingham, of Chicago, Ill., and Charles T. Tittmann, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied.



(250 U. S. 616)

## ABRAMS et al. v. UNITED STATES.

(Argued Oct. 21 and 22, 1919. Decided  
Nov. 10, 1919.)

No. 316.

**1. CONSTITUTIONAL LAW** —90—FREEDOM OF  
SPEECH AND PRESS NOT COVER TO DISLOYAL  
LANGUAGE.

The acts of printing and disseminating, during the war with Germany, pamphlets containing disloyal, scurrilous, and abusive language about the form of government of the United States, also language intended to incite, provoke, and encourage resistance to the United States in the war, etc., were not within the protection of the freedom of speech and of the press guaranteed by Const. U. S. Amend. 1.

**2. CONSTITUTIONAL LAW** —90—WAR —4—  
ESPIONAGE ACT NOT UNCONSTITUTIONAL.

The Espionage Act, as amended by Act May 16, 1918, passed during the emergency of the war with Germany, is not unconstitutional as an entirety, because in conflict with Const. U. S. Amend. 1, guaranteeing freedom of speech and of the press.

**3. CRIMINAL LAW** —1159(3) — CONFLICTING  
EVIDENCE CALLING FOR EXAMINATION OF  
RECORD ON DIRECTED VERDICT.

Defendant's contention that there is no substantial evidence to support judgment, and that their motion for instructed verdict was erroneously denied, presents a question of law calling for an examination of the record, not to weigh conflicting testimony, but only to determine whether there was some evidence competent and substantial before the jury fairly tending to sustain their verdict of guilty.

**4. CRIMINAL LAW** —1177 — AFFIRMANCE IF  
EVIDENCE SUSTAINS ANY COUNT OF INDICT-  
MENT.

Where the sentence imposed did not exceed that which might lawfully have been imposed under any single count of the indictment, containing four counts, the judgment on the jury's verdict of guilty must be affirmed, if the evidence is sufficient to sustain any one of the counts.

**5. WAR** —4—EVIDENCE SUSTAINING CONVIC-  
TION UNDER ESPIONAGE ACT.

In a prosecution of five Russians, non-declarant aliens, for conspiracy to violate the Espionage Act as amended by Act May 16, 1918, evidence held to support conviction, as tending to prove that defendants were guilty as charged in both the third and fourth counts of the indictment, alleging respectively, that they published language intended to incite, provoke, and encourage resistance to the United States in the war with Germany, and that during such war they incited and advocated curtailment of ordnance and munitions.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Jacob Abrams and others were convicted of conspiring to violate the Espionage Act, and they bring error. Affirmed.

Mr. Harry Weinberger, of New York City, for plaintiffs in error.

Mr. Assistant Attorney General Robert P. Stewart, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of

\*617  
the \*Espionage Act of Congress (section 3, title I, of Act June 15, 1917, c. 30, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, 40 Stat. 553 [Comp. St. 1918, § 10212c]).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: [In the first count, "disloyal, scurrilous and abusive language about the form of government of the United States;"] in the second count, language "intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, \* \* \* unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and of these three frankly avow-

\*618  
ed that they were "rebels," "revolution\*ists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the



government of the United States. The fourth defendant testified that he was a "Socialist" and believed in "a proper kind of government, not capitalistic," but in his classification the government of the United States was "capitalistic."

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded "not guilty," and the case of the government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled "Revolutionists Unite for Action," written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

[1, 2] On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that

\*619

freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment.

This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and *Baer v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, and in *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561.

[3, 4] The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain

the verdict. *Troxell, Administrator, v. Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434, 442, 33 Sup. Ct. 274, 57 L. Ed. 586; *Lancaster v. Collins*, 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373; *Chicago & North Western Ry. Co. v. Ohle*, 117 U. S. 123, 129, 6 Sup. Ct. 632, 29 L. Ed. 837. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. *Evans v. United States*, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Debs v. United States*, 249 U. S. 211, 216, 39 Sup. Ct. 252, 63 L. Ed. 566.

[5] The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying:

\*620

"His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity."

It continues:

"He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"

Among the capitalistic nations Abrams testified the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

"The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!"

"Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM."

This is clearly an appeal to the "workers" of this country to arise and put down by force the government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy.

It concludes:

"Awake! Awake, you Workers of the World! REVOLUTIONISTS."

The second of the articles was printed in the Yiddish language and in the translation is headed, "Workers—Wake Up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!" it continues:

"Workers, Russian emigrants, you who had the least belief in the honesty of our government,"

—which defendants admitted referred to the United States Government—

"must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war."

The purpose of this obviously was to persuade the persons to whom it was addressed

\*621

to turn a deaf ear to patri\*otic appeals in behalf of the government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

"With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.*"

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that—

"America and her Allies have betrayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

*"Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that*

\*622

not only the Russian Worker fights for \*freedom, but also here in America lives the spirit of Revolution."

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and

other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

"Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*"

After more of the same kind, the circular concludes:

"Woe unto those who will be in the way of progress. Let solidarity live!"

It is signed, "The Rebels."

That the interpretation we have put upon these articles, circulated in the greatest part of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: "Revolutionists! Unite for Action!"

After denouncing the President as "Our Kaiser" and the hypocrisy of the United States and her Allies, this article concludes:

\*623

\*"Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations *Unite for Action* and let us save the Workers' Republic of Russia!

*"Know you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home."*

Thus was again avowed the purpose to throw the country into a state of revolution, if possible, and to thereby frustrate the military program of the government.

The remaining article, after denouncing the President for what is characterized as hostility to the Russian revolution, continues:

"We, the toilers of America, who believe in real liberty, shall *pledge ourselves*, in case the United States will participate in that bloody conspiracy against Russia, *to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.*"

It concludes with this definite threat of armed rebellion:

"If they will use arms against the Russian people to enforce their standard of order, *so will we use arms*, and they shall never see the ruin of the Russian Revolution."

These excerpts sufficiently show, that while the immediate occasion for this par-



ticular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or lan-

\*624  
guage intended to bring the form of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment and under the long established rule of law hereinbefore stated the judgment of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same

\*625  
leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the

President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian revolution"—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, etc., to fight the workers' republic of Russia, and ends "Awake! Awake, you workers of the world! Revolutionists." A note adds "It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House."

The other leaflet, headed "Workers—Wake Up," with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviks, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend "they will make bullets not only for the Germans but also for the Workers Soviets of Russia," and further, "Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Ger-

\*626  
mans, but also your dearest, best, who are in Russia fighting for freedom." It then appeals to the same Russian emigrants at some length not to consent to the "inquisitionary expedition in Russia," and says that the destruction of the Russian revolution is "the politics of the march on Russia." The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!" and after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

No argument seems to be necessary to show that these pronouncements in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy



of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending section 3 of the earlier Act of 1917 (Comp. St. § 10212c). But to make the conduct criminal that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware of course that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of

\*627

his act \*he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said but it is enough to show what I think and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the Cases of Schenck (249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470) Frohwerk (249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561), and Debs (249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566), were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger

that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power

\*628

er undoubtedly is \*greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the

\*629

former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Ger-

many. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the Act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although

made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless

they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to

time warrants \*making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Mr. Justice BRANDEIS concurs with the foregoing opinion.

(250 U. S. 603)

BANK OF OXFORD et al. v. LOVE et al.,  
Bank Examiners of State of Mississippi.

(Argued Oct. 10, 1919. Decided Nov. 10, 1919.)

No. 9.

1. CONSTITUTIONAL LAW §125—BANK CHARTER A "CONTRACT" UNDER FEDERAL CONSTITUTION.

A bank's charter from a state Legislature, embodied in a special act, constitutes a "contract," protected by the federal Constitution, in its provision against impairment of the obligation of contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

2. CONSTITUTIONAL LAW §129—BANKING LAW REQUIRING EXAMINATIONS AND PAYMENTS TO STATE BANKING DEPARTMENT, CONSTITUTIONAL.

No impairment of the corporate charter of a bank from a state, embodied in special act containing a section that the business of the bank shall be controlled by its stockholders under such rules and regulations as the company may see fit to adopt, will result from reasonable examinations and small prescribed payments for the maintenance of the state banking department; the examinations and payments being required by act of the Legislature of the state of Mississippi of March 9, 1914 (Laws 1914, c. 124).

In Error to the Supreme Court of the State of Mississippi.

Bill by the Bank of Oxford and others against J. S. Love and others, Bank Exami-



ners of the State of Mississippi. From a decree dismissing the bill, complainants appealed to the Supreme Court of Mississippi, which affirmed (111 Miss. 699, 72 South. 133), and complainants bring error. Judgment of the Supreme Court of Mississippi affirmed.

\*604

\*Messrs. Thos. A. Evans, of Memphis, Tenn., Edward Mayes, of Jackson, Miss., and Basil Lamar Mayes, of Oxford, Miss., for plaintiffs in error.

Messrs. Earle N. Floyd, of Meridian, Miss., and Robert H. Thompson, of Jackson, Miss., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

A special act of the Mississippi Legislature approved March, 1872, incorporated the Bank of Oxford and authorized it to "exercise the privilege appertaining to a general banking, exchange and brokerage business, with all the power of a body corporate." Section 4 declares:

"That the business of said bank shall be confided to and controlled by its stockholders under such rules of laws and regulations as said company may see fit to adopt: Provided, the same be not in conflict with the Constitution of the United States or of this state."

It was immediately organized, and has continued to carry on business under the charter so granted.

By a comprehensive act containing 69 sections, \*approved March 9, 1914 (Laws 1914, c. 124), the Legislature prescribed general regulations concerning banking. Its scope is fairly indicated by the title, copied below.<sup>1</sup> Section 23 provides:

\*605

"Each bank subject to the provisions of this act is hereby assessed for each year one-fortieth of one per cent. of its total assets, and the money accruing from said assessment shall be used for the maintenance of the banking department."

<sup>1</sup> "An act establishing a banking department for the state of Mississippi, creating a board of bank commissioners, prescribing their qualifications, duties and compensation, providing for the election of state bank examiners, prescribing their qualifications, duties and compensation, defining what shall constitute a bank and banking business in the state of Mississippi fixing the capital required to do a banking business, and providing for the examination, regulation and control of banks and banking business conducted by corporations, other than national banks and postal savings banks and fixing the assessment for the revenues of the department, fixing qualifications and liability of officers, stockholders and directors of banking corporations; fixing the qualifications and liability of persons, firms and corporations in the banking business; providing for the payment of deposits to minors and other persons under disability and on joint account; prohibiting banking except under the provisions of this act; providing for the liquidation of banks and the distribution of the assets thereof; providing for giving publicity to deposits more than five years old; and prescribing penalties for the breach of any of the provisions thereof, and to provide a system for guaranteeing deposits, and for other purposes, without expense to the state."

After paying one assessment under protest plaintiff bank, May 14, 1914, instituted this proceeding in the chancery court for Hinds county. The original bill sets up and relies upon the charter of 1872 as a contract, protected by the federal Constitution, which by confiding control to stockholders excludes legislative authority in respect thereto. It alleges:

"That the said bank examiners are threatening to interfere with the affairs of this bank and to exercise such powers as are provided for by said statute [of 1914] over this bank, and

\*606

are threatening to \*make such examinations and reports upon and about, and to exercise all the other authorities and powers provided for by such statute, over the affairs of your orator, said bank. And your orator pleads hereby, and invokes for such, its contract immunity from such supervision and control, the said contract clause of the Constitution of the United States, and claims its right exclusively to control and manage the affairs of its own bank."

And further:

"Your orator protests and shows that it was not subject to the provisions of said banking law, and by its said contract charter, the whole scheme so devised, as applied to your orator bank, was unconstitutional and void; and your orator shows that for such reason it was not subject to assessment devised and contrived only for the purpose of maintaining such bank department; and your orator was protected against the payment of such assessment, also, by the said contract clause of the Constitution of the United States."

The prayer is for an injunction perpetually restraining defendants and their successors from examining or undertaking to enforce as against the complainant any provision contained in the act of March 9, 1914, and for a decree requiring repayment of the sum assessed and paid under protest.

[1, 2] No argument is required to show that the charter of 1872 constitutes a contract protected by the federal Constitution. But the construction placed upon section 4 by counsel for plaintiffs in error is not tenable. It really contains nothing which purports to take away commonly recognized power of the state to establish such reasonable and general regulations of banks as may be essential to public safety, and to enforce them through a board supported by moderate assessments upon those engaging in the business.

While the bill proceeds upon the theory that the bank's affairs are wholly exempt from interference by legislative direction, the only past or immediately probable wrongs

\*607

\*adequately complained of are enforced contribution to expense of the banking department and threats by defendants to make examinations and reports. And we think it clear that no impairment of the corporate charter has or will result from reasonable examinations and reports by duly authorized



officers and the small prescribed payments. It is unnecessary to consider other distinct provisions of the statute, and, of course, we intimate no opinion concerning them.

The Supreme Court of the state affirmed a decree of the chancery court dismissing the bill upon demurrer, and its action must be Affirmed.

(250 U. S. 556)

**LEHIGH COAL & NAVIGATION CO. v.  
UNITED STATES.**

(Argued Oct. 14, 1919. Decided Nov. 10, 1919.)  
No. 38.

**CARRIERS — 38—EVIDENCE IN PROSECUTION  
FOR ACCEPTING IMPROPER REBATES.**

In prosecution of a coal company for knowingly accepting rebates and concessions from a railroad, to which it had leased its own lines, in violation of the Elkins Act (Comp. St. §§ 8597-8599), as amended June 29, 1906, the coal company had a right to offer in evidence that the allowance to it by the railroad, referred to in the railroad's filed tariffs, but not specified in figures therein, was received under the honest belief that it was lawfully established by the tariffs, and that in receiving it the company was not disregarding what it believed to be the provisions of the tariffs; misunderstanding in supposing the allowances could be justified by a footnote to the tariffs not being a misunderstanding of the statute itself, instead of the tariffs.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

The Lehigh Coal & Navigation Company was convicted of accepting rebates and concessions from a railroad in violation of the Elkins Act, and it appealed to the Circuit Court of Appeals, which certified two questions for the Supreme Court. The first question answered in the affirmative.

Messrs. Henry S. Drinker, Jr., William Jay Turner, and Abraham M. Beitler, all of Philadelphia, Pa., for Lehigh Coal & Navigation Co.

Mr. Henry S. Mitchell, of Washington, D. C., for the United States.

\*559

\*Mr. Justice McKENNA delivered the opinion of the Court.

The case is here on certificate, an outline of which it is necessary to give.

The Lehigh Coal & Navigation Company, herein called the Company, is a miner and shipper of anthracite coal, and was indicted, convicted and fined in the District Court of New Jersey for accepting rebates and concessions from the Central Railroad of New Jersey in violation of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847, Comp. St. §§ 8597-8599), as amended June 29, 1906 (34 Stat. 584, c. 3591).

It was charged in the indictment that the Central Railroad Company was an interstate carrier of coal and as such filed tariffs and schedules with the Interstate Commerce Commission showing its rates and charges from the coal fields in Pennsylvania to points in New Jersey.

During 1912, 1913, 1914, and a part of 1915, the tariffs were in force and under them the Company shipped a carload (described in the indictment) from its colliery in Pennsylvania to a specified point in New Jersey and accepted from the railroad a portion of the rate due and payable so that the coal was carried at less than the rate and the Company thus received the advantage of an illegal rebate. Discrimination was not charged.

In accordance with circumstances, which are detailed at length in the certificate, among which was the fact that the Company at one time operated a railroad of its own (the Lehigh & Susquehanna), the Company decided to lease its railroad properties to the Central Railroad, a connecting carrier. Accordingly, March 31, 1871, it, the Company, made a lease to the Railroad, the 10th covenant of which provided as follows:

"\* \* \* On coal delivered for transportation by the Company on sidings at the northern end of the Nesquehoning tunnel, the rates of

\*560

transportation shall not exceed \*the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the Central Railroad or by the Lehigh Valley Railroad Company."

In making the lease naturally the Company took into account the advantageous nearness of its mines to tide and sought to insure favorable rates for the coal from its collieries.

About 1878 the method of fixing rates was changed but the rate to be charged the Company was fixed at 86 per cent. of the rate charged to other mines in the Lehigh region, the reason being that there was that difference in distance. While this arrangement was in force the Company paid a net rate calculated on the basis of 86 per cent. After 1887, the date of the first act to regulate commerce, this method of settlement was changed and the Company was charged the full tariff rate, but was rebated or credited with 14 per cent. thereof, this being done under the obligation or supposed obligation of the tenth covenant. And between 1887 and August, 1906, when the Hepburn Act went into effect, this arrangement for repayment did not appear in the tariffs filed by the Railroad with the Commission. But in August, 1906, and thereafter the tariffs contained a footnote in the following form:

"(4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh & Susquehanna Railroad, a lateral allowance is

made out of herein-named rates to the Lehigh Coal & Navigation Company on all anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning, and Hacklebarne districts, mined and shipped by it, when coming via the Hauto, Nesquehoning, and Mauch Chunk gateways."

All of the tariffs of the Railroad filed with the Commission after 1906 (262 in number)

**\*561**

contained the footnote. \*The allowance was 19.18 cents per ton and this was credited in the monthly settlement of the Company's account with the Railroad, the credit being the point of the government's attack.

"The verdict covers 27 shipments of coal in prepared sizes from Nesquehoning colliery for reshipment at Elizabeth. The foregoing facts were either proved or stipulated, and it appeared also without dispute that during the years in question the Company's officers were familiar with the contents of the Central Railroad's tariffs, and knew that the allowance was being made and accepted. One of the Company's defenses was that it had not 'knowingly' accepted a rebate within the meaning of the act—its contention being, that the allowance had been accepted in good faith, in the honest belief that the payment was justified by the tenth covenant, and also in the honest belief that the allowance was properly and legally noted and provided for in the filed and published tariffs."

The Company offered evidence that would support the following findings:

(1) At the time the note was made, it, the Company, was informed of it, but was advised that the note had been made part of the tariff in full compliance with the act of 1906 and that being so the payment and receipt of the allowance would comply with the tariff and the law and the officers of the Company relied on this judgment.

(2) Between 1906 and the date of the indictment 262 tariffs, all containing the note, had been filed and accepted by the Commission.

(3) In 1908 the Company had been informed by the Railroad that the Commission (acting through one of the Commission's important officers who was in charge of the tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein. the Commission at the time having the question under con-

**\*562**

sideration. \*By reason of such information the Company honestly believed that the receipt of the allowance was not in violation of the tariff or the act, but was in compliance therewith.

(4) The Company's books, records and accounts were examined by the Commission's investigators in 1909 and the Commission was thereby informed that the Company had received and was receiving the allowance, but the Commission did not object either to the form or the substance of the practice.

"The Company's evidence concerning good faith was received under the government's objection, and the government offered evidence in contradiction thereof. At the close of the trial the court struck out all the evidence on this subject from the record, and refused to submit the question of good faith to the jury, holding that the Company's honest belief that the allowance was permitted by the tariffs and the footnote thereto could not affect the issue, for the reason that the Company knew the contents of the tariffs, and knew also that the allowance was actually made and received."

The certificate asks the following questions:

"1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff, but was not specified in figures therein, has the defendant a right to offer in evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?"

"2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury?"

The questions asked depend upon the construction of the Elkins Act, as enacted in

**\*563**

1903 (32 Stat. 847), the relevant \*part of which is as follows:

" \* \* \* It shall be unlawful for any person, or persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall *by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier* [italics ours]. \* \* \*"

And under an amendment in 1906 (34 Stat. 584) an offender, "whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor."

The way to a correct construction of the act was to an extent cleared by the case of *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. Its evolution was there detailed. It was said that carrier and shipper are charged with an equal responsibility and liability and that the act "proceeded upon broad lines to accomplish" this equality, and "that the only rate charged to a shipper for the same service under the same conditions should be the one established, published, and posted as required by law." And this was declared in various ways to be the test of obligation and



liability and the "form by which or the motive for which" its evasion or disregard is accomplished is not of modifying or determining consideration. It was in effect decided that the purpose of the statute took emphasis and meaning from the use of the word "device," and "device" was defined to be "anything which is a plan or contrivance" and is "disassociated" from qualification and "need not be necessarily fraudulent," and by it the act "sought to reach all means and methods by which the unlawful preference of rebate, or concession or discrimination is offered, granted, given or received."

It is in effect the contention of the govern-

\*564

ment that the \*language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.

No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and the decision the test of equality is the tariff rate. It was said in the opinion that it is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. *N. Y. Central & H. R. R. v. United States*, 212 U. S. 500, 505, 29 Sup. Ct. 309, 311 (53 L. Ed. 624). And such was the offense of the Armour Packing Company. There was no evasion of the tariff rate in the case at bar. The filed tariff indicated the existence and obligation of the tenth covenant of the lease from the Company to the Railroad, that is, the fact of the allowance was declared, though it did not have specification in figures. The tariff, of course, would have been more definite and complete with such specification, but its sufficiency was certainly believed in for between 1906 and the date of the indictment it had 262 repetitions. The Company was given besides the assurance that it had the sanction of the Interstate Commerce Commission.

There was no attempt at deception. The Commission knew by examination of the Company's books of the allowance and the amount of the allowance. Such, then, is the situation, and distinguishes the case from the Armour Packing Company Case. There there was an omission to comply with the

\*565

statute and the omission was attempted to \*be justified by honesty of motive and purpose; here there was compliance or attempted com-

pliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency the belief of the Company in its legality was supported by high authority and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be "knowingly" done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

We think this comment and conclusion enough to dispose of the questions asked and that there is no necessity to review the cases cited by the Company or the government.

Some of the contentions of the government we may notice. It is contended that the "lateral allowance" provided for in the tenth covenant and footnote to the tariff was not for transportation services and besides that there was no testimony whatsoever that the meaning of any provision of the tariff was misunderstood. The mistake, if any, it is hence insisted, was a mistake of law, not of fact. Two deductions are hence made by the government: (1) That the allowances were not made for transportation services; (2) Mistake of law is irrelevant to the question of the guilt or innocence of the Company.

To the first we may reply it is not involved as an element in the question asked of this court and if it have any justification, as to which we express no opinion, it no doubt will be considered by the Circuit Court of Appeals upon the return of the case. The other expresses a refinement. Indeed, the contention of the government is somewhat elusive and we are not sure that we exactly estimate it. It is said:

"The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the 'allowances' could be justified by the footnote in the tariff, and that,

\*566

as we have seen, would be a \*misunderstanding of the Elkins Act and not of the tariff."

We are unable to concur. There was no misunderstanding of the Elkins Act or what it required. The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word "knowingly" therefore, as we have already indicated, must be considered and given exculpating effect if error there was.

We therefore answer the first question in the affirmative, but as explained by reference to the certificate of facts above. We do not think it is necessary to answer the second question.

Mr. Justice McREYNOLDS took no part in the decision.



(250 U. S. 577)

PITTSBURGH, C., C. & ST. L. RY. CO. v.  
FINK.

(Argued Oct. 7, 1919. Decided Nov. 10, 1919.)

## No. 2.

1. CARRIERS ⇐32(1) — CHARGE ON INTER-  
STATE SHIPMENT VARYING FROM FILED TAR-  
IFF RATES.

Under the Act to Regulate Commerce, § 6 (Comp. St. § 8569), making it unlawful for an interstate carrier to receive compensation less than the sum fixed by its tariff rates filed, it was unlawful for such a carrier, a railroad, on delivering merchandise shipped in interstate commerce, to make a charge departing from its filed tariff rates.

2. CARRIERS ⇐197(1)—DISCHARGE OF LIEN  
ON SHIPMENT ONLY ON TENDER OR PAYMENT.

For its legal charges, a common carrier by rail had a lien on the goods carried, which could be discharged, and the consignee become entitled to the goods only upon payment or tender of the rate.

3. CARRIERS ⇐194—RIGHT TO RECOVER BAL-  
ANCE OF FREIGHT UNDERCHARGE.

Where a shipment was made by rail from California to Ohio, and the carrier on delivery to the consignee accepted from him a charge smaller than that specified for such goods under its filed tariffs, and therefore illegal under Act to Regulate Commerce, § 6 (Comp. St. § 8569), the railroad can recover from the consignee the amount still due it, though by agreement with the consignor the consignee did not become owner of the goods until delivery; no estoppel against the railroad in favor of the consignee being available to avoid the requirements of the act as to equal rates.

In Error to the Court of Appeals of Montgomery County, Ohio.

Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against Alvin J. Fink. To review judgment for defendant, plaintiff brought error to the Court of Appeals of Montgomery County, Ohio, which reversed (19 Ohio Cir. Ct. R. [N. S.] 103), and defendant brings error. Judgment of the Court of Appeals reversed, and cause remanded to that court for further proceedings not inconsistent with the opinion.

## \*578

\*Messrs. William M. Matthews, Edwin P. Matthews, both of Dayton, Ohio, and F. D. McKenney, of Washington, D. C., for plaintiff in error.

Mr. Roy G. Fitzgerald, of Dayton, Ohio, for defendant in error.

## \*579

\*Mr. Justice DAY delivered the opinion of the Court.

An action was brought by the railway company before a justice of the peace in Mont-

## \*580

gomery county, Ohio, to \*recover \$15, the freight charges upon a shipment in interstate

commerce from Los Angeles, Cal., to Dayton, Ohio. The defendant, Fink, prevailed in the magistrate's court, the judgment was reversed in the court of common pleas, the case was taken to the Court of Appeals of Montgomery County where the judgment of the court of common pleas was reversed and that of the magistrate affirmed. Fink v. Pittsburgh, C., C. & St. L. R. Co., 19 Ohio Cir. Ct. R. (N. S.) 103. The Supreme Court of Ohio denied a motion to require the record to be certified to it by the Court of Appeals, and the case is here upon writ of error to the Court of Appeals of Montgomery County, Ohio.

The facts are that the railroad company on September 13, 1910, delivered to Fink, the consignee, two boxes of Indian relics shipped to him at Dayton, Ohio, from Los Angeles, Cal., the waybill specifying charges in the sum of \$15, which sum Fink paid upon receipt of the goods. The tariff rates filed with the Interstate Commerce Commission so classified this merchandise that the transportation charges should have been \$30 instead of \$15. It is for the difference that this action is prosecuted.

It appears that Fink had dealt with the consignor at Los Angeles in such wise that some old coins, belonging to Fink, were to be traded for a collection of Indian relics. Fink shipped the coins to the postmaster at Los Angeles to be held for his protection. At the time the action was brought, about one year after the shipment, the postmaster had released the coins, and Fink had sold some of the relics. Fink testified that he had no knowledge of the freight classification and rates, and simply paid the freight bill as it was presented to him. No agreement appears to have been made with the consignor that Fink should pay the freight charges.

Examination shows some conflict of authority as to the liability at common law

## \*581

of the consignee to pay freight \*charges under the circumstances here shown. The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier. See the cases collected and discussed in Hutchinson on Carriers (3d Ed.) § 1559. However this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce. The purpose of the Act to Regulate Interstate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure.

[1-3] Section 6 of the Act to Regulate Com-

merce (Comp. St. § 8569), which was in force at the time of this shipment, provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier

\*582

turned over \*the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation. *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665. In that case the rule herein stated was enforced as against a passenger who had purchased a ticket from an agent of the company at less than the published rate. The opinion in that case reviewed the previous decisions of this court, from which we find no occasion to depart.

It is alleged that a different rule should be applied in this case because Fink by virtue

of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no proof that such agreement was known to the carrier, nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods. *Pennsylvania Railroad Co. v. Titus*, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862. Nor can the defendant in error successfully invoke the principle of

\*583

estoppel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the Act as to equal rates, in violation of the provisions of the statute. *New York, New Haven & Hartford R. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 40, 102 N. E. 366.

In our view the court of common pleas correctly held Fink liable for the payment of the remaining part of the legal rate upon the merchandise received by him. The judgment of the Court of Appeals of Montgomery County, Ohio, is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

(250 U. S. 583)

STILSON v. UNITED STATES.

SUKYS v. SAME.

(Argued Oct. 20 and 21, 1919. Decided Nov. 10, 1919.)

Nos. 264 and 265.

1. CRIMINAL LAW ⇨622(1)—JOINT TRIAL OF CODEFENDANTS IN DISCRETION OF COURT.

Joint inditees may, in the discretion of the court, be ordered to be tried together.

2. JURY ⇨84—PEREMPTORY CHALLENGES ON JOINT TRIAL.

Const. Amend. 6, merely securing to accused in a criminal case trial by an impartial jury, is not contravened by the statute, now Judicial Code, § 287 (Comp. St. § 1264), which, while giving a party right to a certain number of peremptory challenges, treats several defendants, for such purpose, as one party.

3. CRIMINAL LAW ⇨1172(1)—INSTRUCTION NOT PREJUDICIAL.

Defendants, on prosecution for violations of Espionage Act, could not be prejudiced by instruction that the jury might be supposed to know the fact that the country was at war.

4. CRIMINAL LAW ⇨822(6) — INSTRUCTION LEAVING QUESTION OF FACT TO JURY.

Charge, taken as a whole, on prosecution for violation of Espionage Act, held to fairly leave to the jury the question of whether the facts made a case coming within the denunciation of the statute.

5. CRIMINAL LAW — 777½ — INSTRUCTIONS DISCUSSING EVIDENCE.

The charge is not objectionable because not discussing the evidence in detail, particularly in the absence of a specific request for comment on any specific phase of it.

6. CRIMINAL LAW — 1159(2) — WEIGHING TESTIMONY ON APPEAL.

It is not the province of the Supreme Court to weigh testimony.

7. CRIMINAL LAW — 1159(2) — REVIEW OF SUFFICIENCY OF EVIDENCE ON APPEAL.

It is enough to support on appeal the judgment in a criminal case, if there was substantial evidence inculcating defendants, which, if believed by the jury, would justify the submission of the issues to it.

8. ARMY AND NAVY — 40 — EVIDENCE SUSTAINING CONVICTION OF CONSPIRACY TO VIOLATE ESPIONAGE ACT.

Evidence, on prosecution for conspiracy to violate Espionage Act, § 3 (Comp. St. 1918, § 10212c), of persons connected with a newspaper published in the Lithuanian language, held sufficient to justify submission of the question of guilt.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In error to the District Court of the United States for the Eastern District of Pennsylvania.

Joseph Stilson and Joseph Sukys were convicted of violation of the Espionage Act, their motions in arrest of judgment and for new trial were denied (254 Fed. 120), and they bring error. Affirmed.

\*584

\*Messrs. Henry John Nelson and Henry J. Gibbons, both of Philadelphia, Pa., for plaintiffs in error.

Mr. Robert P. Stewart, Asst. Atty. Gen., for the United States.

Mr. Justice DAY delivered the opinion of the Court.

The plaintiffs in error were indicted with two others, not apprehended, and were convicted under the conspiracy section (4) of the Espionage Act (Act of June 15, 1917, c. 30, tit. 1, 40 Stat. 217, 219 [Comp. St. 1918, § 10212d]). The section which the plaintiffs in error were charged with a criminal conspiracy to violate (3) provides:

" \* \* \* Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, \* \* \* shall be punished by a fine of not more than \$10,000, or imprisonment for not more than twenty years, or both. \* \* \* " Comp. St. 1918, § 10212c.

A second count in the indictment charged a conspiracy to violate certain provisions of

the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a-2044k)). The sentences imposed, within the act upon either count of the indictment, were three years' imprisonment for Stilson and three months for Sukys. The government does not press the conviction upon the second count.

\*585

\*The overt acts charged to have been committed in pursuance of the conspiracy consisted of the publication and distribution of a certain newspaper called "Kova" and circulars published in the Lithuanian language. The cases come directly to this Court because of constitutional questions raised and decided in the court below. Since the proceedings in that court some of the constitutional questions have been determined, and need not be considered. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566.

Counsel for plaintiffs in error in view of these decisions only press for consideration certain assignments of error comprised in the following summary.

1. Whether or not, in ruling that there could be no severance of defendants and that a peremptory challenge by one defendant should count as a challenge by all defendants, the trial judge was in error under Article VI of the Amendments of the United States Constitution.

2. Whether or not the trial judge erred in his charge to the jury in that portion thereof in which he said the jury might determine the guilt of the defendants from general information.

3. Whether or not the trial judge erred in not refreshing the jury's memory as to the evidence.

4. Whether or not the trial judge erred in overruling a motion to take the case away from the jury, and in refusing to charge the jury, "under all the evidence your verdict should be 'not guilty.'"

Of these in their order:

[1, 2] 1. It is provided in the Sixth Amendment to the Constitution of the United States that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. That it was within the discretion of the court to order the defendants to be tried together there can be no question, and

\*586

the practice is too well established \*to require further consideration. The contention raised under the Sixth Amendment comes to this: That because plaintiffs in error were not each allowed ten separate and independent peremptory challenges they were therefore denied a trial by an impartial jury. The statute (Act March 3, 1911, c. 231, § 287, 36 Stat. 1166 [Comp. St. § 1264]) regulating the



matter of peremptory challenges is clear in its terms and provides:

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."

The requirement to treat the parties defendant as a single party for the purpose of peremptory challenges has long been a part of the federal system of jurisprudence, it certainly dates back to 1865 and was adopted in the Revised Statutes, and has now become a part of the Judicial Code. 36 Stat. 1166, § 287. *Schwartzberg v. United States*, 241 Fed. 348, 154 C. C. A. 228. There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress. That body has seen fit to treat several defendants, for this purpose, as one party. If the defendants would avail themselves of this privilege they must act accordingly. It may be, as is said to have been the fact in the trial of the present case, that all defendants may not wish

\*587

to exercise the right of peremptory challenge as to the same person or persons, and that some may wish to challenge those who are unobjectionable to others. But this situation arises from the exercise of a privilege granted by the legislative authority and does not invalidate the law. The privilege must be taken with the limitations placed upon the manner of its exercise.

[3, 4] 2. It is insisted that there was prejudicial error in so much of the charge as is contained in the following language:

"The next question for you to determine is the presence of essential elements. One of them is, for instance, that the United States is at war. Secondly, that what was done was an attempt to cause insubordination, or what was done did amount to obstructing enlistment, and the question may arise in your mind how are you to determine that. Whenever you are asked as a jury to pass upon anything which is a matter within common knowledge, common information, things which people ordinarily know, which are generally and practically universally known, when you are passing upon such questions, you have the right to call upon your general knowledge and information. You must determine, for instance, the question

whether or not we are at war, because unless we are, this indictment goes for nothing. You may determine that from your general information this is something of which, in the phrase of the law, the law takes judicial notice. So also when you come to determine the question of whether or not there was an attempt to cause insubordination, you take, of course, all the evidence into the case, and you have a right to direct your minds, as naturally you would, to the character of these publications themselves, these pamphlets and these articles, and determine from them, assisted by all the other evidence in the case, whether or not they do reach the dignity of the charge of attempting to cause insubordination; or amount to an obstruction of enlistment."

\*588

\*Certainly no prejudice could arise from an instruction that the jury might be supposed to know the fact that the country was at war. As to the other part of the charge, the jury were told to look at all the evidence, including the character of the publications, and determine from them whether there was an attempt to cause insubordination and a willful obstruction of enlistment; in other words—whether they amounted to a substantial violation of the statute. We find no well-founded objection to this part of the charge. It is true this language was used in connection with the observations concerning judicial notice as to the country being in a state of war, but we are of opinion, taking the charge together, that the question was fairly left to the jury upon the evidence in the part of the instruction which we have quoted, which left to it to determine whether the facts made a case coming within the denunciation of the statute.

[5] 3. It is contended that the court did not analyze and discuss the details of the evidence. The trial judge left matters of fact to the determination of the jury in a charge commendable for its fairness. Certainly the lack of discussion in detail does not amount to a valid objection; particularly in the absence of any specific request for comment upon any special phase of the testimony.

[6-8] 4. As to the contention that there was no evidence to warrant the convictions of the accused—it must be borne in mind that it is not the province of this Court to weigh testimony. It is sufficient to support the judgment of the District Court, if there was substantial evidence inculcating the defendants which, if believed by the jury, would justify the submission of the issues to it. It would serve no good purpose to set forth the contents of the newspaper articles and the circulars, the publication and distribution of which were alleged to be the overt acts in furtherance of the alleged conspiracy. That they contain appeals tending to cause

\*589

disloyalty and refusal of duty in the military forces of the United States, and to obstruct the recruiting and enlistment service of the government is sufficiently apparent on the

face of the publications. That those who by concerted action prepared and circulated such writings could be found guilty of a conspiracy is equally clear. The connection of the plaintiffs in error with the Lithuanian Socialist Federation, whose membership was shown to be actively opposed to the prosecution of the war, is apparent from a perusal of the record. Stilson was the translator-secretary of the Federation. There is evidence tending to show that one of the circulars entitled, "Let Us Not Go to the Army," was mimeographed from the typewriter controlled and operated by him. Language of the same character as that set forth in the incriminating circulars is found in articles in evidence which were admittedly written by him.

Sukys had been a correspondent of "Kova," and was afterwards manager of the Kova printing plant and was appointed by the executive committee of the Federation, and incriminating acts of his are clearly shown in the record.

We agree with the trial court that there was ample testimony justifying the submission of the question of the guilt of the accused to the jury, who found both of the plaintiffs in error guilty of concerted action amounting to a conspiracy to violate the provisions of the act. We find no error in this record, and the judgments are

Affirmed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS dissenting on the ground that as the sentence was upon a general verdict of guilty on both counts, one of which is not sustained, the judgment should be reversed.

(250 U. S. 590)

MULLEN et al. v. PICKENS et al.

SAME v. GARDNER et al.

(Submitted Oct. 13, 1919. Decided Nov. 10, 1919.)

Nos. 25 and 26.

INDIANS § 15(1) — DEEDS OF HEIRS OF DECEASED INDIAN PRIOR TO ALLOTMENT.

In view of Act April 21, 1904, Act April 26, 1906, and Act May 27, 1908, under Supplemental Agreement with the Choctaw and Chickasaw Tribes of Indians embodied in Act of Congress of July 1, 1902, relating to the allotment of the tribal lands, not only does the equity of the heir of a deceased member of a tribe take its inception at the selection of the allotment, but any previous attempt to sell his expectancy is contrary to the spirit and policy of the act, which cannot be evaded by giving to conveyances with warranty or its equivalent made by heirs of a deceased Indian prior to

actual allotment effect as covenants to convey allotments thereafter to be selected, either on the ground of estoppel, or because of a state statute having like force, and this even though the conveyances contained a clause that, if the allotments should be set aside, other lands should be selected instead, which should pass to the grantees; the grantors executing further conveyances.

In Error to the Supreme Court of the State of Oklahoma.

Actions by Malinda Pickens and others and by Anderson Gardner and another against J. S. Mullen and others. To review judgments for plaintiffs, defendants brought error to the Supreme Court of Oklahoma, which affirmed (56 Okl. 65, 155 Pac. 871; 57 Okl. 186, 156 Pac. 1150), and defendants bring error. Judgments affirmed.

Messrs. Fred R. Ellis, of Lawton, Okl., and H. A. Ledbetter, of Ardmore, Okl., for plaintiffs in error.

Mr. C. S. Arnold, of Enid, Okl., for defendants in error Pickens and others.

Mr. Justice PITNEY delivered the opinion of the Court.

These cases were submitted together and involve but a single question, which turns upon the effect to be given to the provisions of the Supplemental Agreement with the Choctaw and Chickasaw Tribes of Indians (Act July 1, 1902, c. 1362, 32 Stat. 641) relating to the allotment of the tribal lands. In each case an enrolled Indian died subsequent to the ratification of the Agreement and be-

\*591

fore \*selection of an allotment; in each case the personal representative selected lands for allotment in the name of the deceased Indian, which shortly afterwards were attempted to be conveyed by the heirs of such Indian by warranty deeds through which plaintiffs in error claim, each of which deeds contained a clause to the effect that if for any reason the selection of the lands described in the deed should be set aside, other lands should be selected instead, and these should pass to the grantees, and the grantors would execute further conveyances if necessary. In each case the selection for allotment thus made was set aside in contest proceedings, and another selection thereafter made, followed by an allotment in the name of the deceased Indian. And the question is whether plaintiffs in error, by virtue of the deeds for the prior selections and the special covenants contained in them, are entitled in equity to the lands subsequently allotted. The Supreme Court of Oklahoma held not. *Mullen v. Pickens*, 56 Okl. 65, 155 Pac. 871; *Mullen v. Gardner*, 57 Okl. 186, 156 Pac. 1160. Its judgments were entered before the taking effect of Act Sept. 6, 1916, c. 448, 39 Stat. 726, amending section 237, Judicial Code



(Comp. St. § 1214), and the present writs of error were applied for and allowed within the time permitted by section 7 of the amending act.

Pertinent provisions of the Supplemental Agreement are set forth in the margin.<sup>1</sup>

\*592

\*In *Franklin v. Lynch*, 233 U. S. 269, 34 Sup. Ct. 505, 58 L. Ed. 954; a white woman, widow of a Choctaw Indian, having applied to be admitted as a member of the tribe by intermarriage, made a warranty deed in October, 1905, for lands exclusive of homestead which might be finally allotted to her, with an accompanying agreement to make conveyance when the land should be actually allotted. Thereafter she was enrolled as an intermarried citizen, made her selection, and received a patent for land, all of which, except the homestead, she sold for value to other parties. This court held (affirming the Supreme Court of Oklahoma) that the earlier deed and the agreement were void because until allotment the Indian had no undivided

<sup>1</sup>11. There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations. \* \* \*

12. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead. \* \* \*

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided. \* \* \*

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value. \* \* \*

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. \* \* \*

\*593

interest in the tribal land nor any vendible interest in any particular tract, and because the attempted conveyance was in conflict with the provisions of sections 15 and 16 of the Supplemental Agreement to the effect that lands allotted should not be affected by any deed, debt, or obligation contracted prior to the time at which such land might be alienated under the act, and should not be alienable except after issuance of patent. It was contended that the prohibition against sale, in its application to the particular case, had been removed by Act April 21, 1904, c. 1402, 33 Stat. 189, 204, providing that "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood" should be removed. But we held that while this removed the restriction to the extent of permitting members who were not of Indian blood to sell land after it had been actually allotted in severalty, it did not permit even a non-Indian to sell a mere float or expectancy.

It is insisted that a different rule must be applied with respect to lands allotted pursuant to section 22 in the name of a deceased member for the benefit of his heirs, as to which there is no express restriction upon alienation like those found in sections 15 and 16, and, in the absence of such restriction, no obstacle in the way of the owner conveying his equitable interest after allotment, as was held by this court in *Mullen v. United States*, 224 U. S. 448, 457, 32 Sup. Ct. 494, 56 L. Ed. 834 (and see like rulings, as to the corresponding provisions of the Creek Agreement, in *Skelton v. Dill*, 235 U. S. 206, 210, 35 Sup. Ct. 60, 59 L. Ed. 138, and *Woodward v. De Graffenried*, 238 U. S. 284, 319, 35 Sup. Ct. 764, 59 L. Ed. 1310). But the decision in *Franklin v. Lynch*, supra, was based not alone upon the express restrictions, but upon the absence of individual interest in the tribal land prior to allotment and the general policy of the Agreement not to permit the improvident sales that would result if a prospective allottee were enabled to sell his expectancy.

We have not overlooked the fact that in

\*594

construing a treaty made October 27, 1832 (7 Stat. 399), between the United States and the Pottawatomie Indians, ceding their possessory interest in certain lands to the United States, with a reservation of a considerable number of sections to particular named Indians to be granted to them when selected, it was held by this court in two cases that the treaty itself converted the reserved sections into individual property and created an equitable interest that was the subject of sale and conveyance, and that warranty deeds made prior to selection operated to vest the title in the grantee as soon as the lands were selected and patented. *Doe v. Wilson* (1859) 23 How. 457, 16 L. Ed. 584; *Crews v. Burcham* (1861) 1 Black, 352, 17 L. Ed. 91. Nor



that a similar result was reached in *Jones v. Meehan*, 175 U. S. 1, 21, 23, 32, 20 Sup. Ct. 1, 44 L. Ed. 49, under the provisions of a treaty with certain bands of Chippewa Indians made October 2, 1863, by which a particular reservation was set apart for one of their principal chiefs.

But we deem it impossible in right reason to apply the doctrine of these decisions to the case in hand. Section 22 of the Supplemental Agreement provides, not for any special grant or reservation in favor of particular Indians upon any special meritorious consideration, but makes a substituted provision, in the allotment scheme, in favor of the heirs of any enrolled Indian who might happen to die after the ratification of the Agreement and before selection of his allotment. In the absence of anything to the contrary, the lands prior to allotment were to remain communal, without private interest that was capable of descent or alienation. *Gritts v. Fisher*, 224 U. S. 640, 642, 32 Sup. Ct. 580, 56 L. Ed. 928; *Sizemore v. Brady*, 235 U. S. 441, 449-451, 35 Sup. Ct. 135, 59 L. Ed. 308. And no reason is suggested, nor does any occur to us, for creating by implication from the provisions of section 22 a separate interest or equity in the heirs of a deceased member prior to allotment that by the general scheme of the act and the express provisions of sections 15 and 16 was withheld from a member entitled to receive an allot-

\*595

ment in his own right. The \*implication is clearly to the contrary; and we hold that not only by the terms of section 22 does the equity of the heir of a deceased member take its inception at the selection of the allotment, but that any previous attempt to sell his expectancy is contrary to the spirit and policy of the act.

*Mullen v. United States*, 224 U. S. 448, 457, 32 Sup. Ct. 494, 56 L. Ed. 834, cited by plaintiff in error, is not in point, for the lands there in controversy had been duly allotted, and the only question was whether they might be alienated thereafter and before the issuance of patent, a question affirmatively answered by reference to the proviso of section 19 of the act of April 26, 1906 (34 Stat. 137, 144, c. 1876).

In confirmation of our view as to the meaning and effect of section 22 of the Supplemental Agreement, reference may be made to several acts of Congress respecting restrictions upon the lands of the Five Civilized Tribes, containing some provisions for their removal, and others for their maintenance except so far as removed, the language of which is inconsistent with the theory that there was any individual interest or equity in such lands prior to the selection of an allotment. Act April 21, 1904, c. 1402, 33 Stat. 189, 204; Act April 26, 1906, c. 1876, § 19, 34 Stat. 137, 144; Act May 27, 1908, c. 199, 35 Stat. 312. They amount to a legisla-

tive declaration of the true intent and meaning of the Agreements respecting allotment of the lands of these tribes.

The provisions of the Supplemental Agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect as a covenant to convey an allotment thereafter to be selected, either upon the ground of estoppel or because of any state statute having like force. *Starr v. Long Jim*, 227 U. S. 613, 624, 33 Sup. Ct. 358, 57 L. Ed. 670; *Monson v. Simonson*, 231 U. S. 341, 347, 34 Sup. Ct. 71, 58 L. Ed. 260.

Judgments affirmed.

(250 U. S. 549)

UNITED STATES ex rel. ALASKA SMOKE-  
LESS COAL CO. v. LANE, Secretary  
of Interior, et al.

(Argued Oct. 14, 1919. Decided Nov. 10, 1919.)

No. 36.

1. MINES AND MINERALS — 40—POWER OF  
GENERAL LAND OFFICE IN PASSING ON COAL  
CLAIMS NOT MINISTERIAL.

The power of the General Land Office to approve and pass to patent an application for certain coal claims necessarily is something more than ministerial, and yet is not arbitrary, without statutory direction or regulation by settled rules and principles; the Land Office is like any other tribunal, its institution and purpose defining and measuring its power, the determining elements being those of fact and law, on which judgment necessarily must be passed.

2. MANDAMUS — 85—TO COMPEL PATENT OF  
COAL CLAIMS AFTER ADVERSE FINDING BY  
LAND OFFICE DENIED.

Where a local land office of the United States in Alaska, the Commissioner of the General Land Office, and the Secretary of the Interior in succession decided that Rev. St. §§ 2347-2352 (Comp. St. §§ 4659-4664), as extended to Alaska by Act Cong. June 6, 1900, amended by Act April 23, 1904 (Comp. St. §§ 5071-5074), contemplated as a basis of a valid location of coal claims the opening and developing of a producing mine of coal, and that the work to be performed upon a claim for prospecting purposes only does not fulfill the requirement, also that such was the character of the work done on the claims involved, there is no right, in the company seeking to patent the claims, to mandamus to require the Secretary and the Commissioner to prove and pass them to patent.

3. MANDAMUS — 72—NO CONTROL OF DISCRE-  
TIONARY OFFICIAL ACTION.

Where there is discretion in official action, even though the conclusion of the authority be disputable, it is impregnable to mandamus.

In Error to the Court of Appeals of the District of Columbia.

Petition for mandamus by the United States, on the relation of the Alaska Smokeless Coal Company, against Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as Commissioner of the General Land Office. From a judgment dismissing the petition, relator appealed to the Court of Appeals, which affirmed (46 App. D. C. 443), and relator brings error. Judgment affirmed.

Messrs. Dean Burkheimer and Charles E. Shepard, both of Seattle, Wash., James R. Caton, of Alexandria, Va., and A. A. Hochling, Jr., Stanton C. Peelle, and C. F. R. Ogilby, all of Washington, D. C., for plaintiff in error.

Mr. Assistant Attorney General Nebeker, for defendants in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Petition for mandamus to require the Secretary of the Interior and the Commis-

\*550

sioner of the General Land Office \*to approve and pass to patent the application of the petitioner for certain coal claims, or to show cause why they have not done so.

Respondents replied that they are constituted by law the sole agents of the government in the administration and disposal of the public lands by and through the means appointed by Congress and have exclusive jurisdiction to determine the validity of all claims or applications to enter or acquire any part of them, and that the discharge of that duty involves judgment and discretion.

And further replied that petitioner sought to acquire title to the coal claims under the Act of April 28, 1904, c. 1772, 33 Stat. 525 (Comp. St. §§ 5071-5074), and the Act of May 28, 1908, c. 211, 35 Stat. 424 (Comp. St. §§ 5075-5078), by virtue of the locations set out in the petition. That the locations came on to be heard and that they, respondents, after considering all of the evidence and applying the law thereto, found and determined that the locations involved were invalid, the locators not having opened or improved any mine or mines of coal on any of the tracts of land in controversy, as required by the cited statutes, and that petitioner was not entitled to purchase the same, and thereupon respondents in the exercise of their discretion and judgment rejected the application.

Hence they prayed that the rule against them be discharged and the petition dismissed.

Petitioner demurred to the reply on the ground that it did not set forth any substantial or legal defense. The demurrer was overruled, and, petitioner electing to stand upon it, the rule to show cause was discharged and the petition dismissed. The judgment was affirmed by the Court of Appeals.

[1] The question in the case, therefore, is

direct, that is, the power of the Land Office under the cited statutes and the facts recited in the petition. This power, we may say at the outset, necessarily is something more than ministerial, the mere yielding to

\*551

and registry of any demand, \*and yet, on the other hand, not arbitrary, without statutory direction or regulation by settled rules and principles. In other words, the Land Office is like any other tribunal—its institution and purpose defining and measuring its power, the determining elements being those of fact and law, upon which necessarily judgment must be passed.

What are the elements of fact and of law in the present case? As set forth in the petition they are these:

Sections 2347 to 2352 of the Revised Statutes (Comp. St. §§ 4659-4664) provide for the entry of vacant coal lands, 160 acres to an individual, 320 acres to an association, who have *opened and improved*, or shall "*open and improve* [italics ours], any coal mine or mines upon the public lands." Section 2348.

These sections were extended to Alaska by an act passed June 6, 1900 (31 Stat. 658, c. 796), and the latter act was amended by the Act of April 28, 1904, *supra*, section 1 of which provides:

"That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have *opened or improved* [italics ours] a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated. \* \* \*

Section 2 of the act provides for the application for and issue of patent.

The Act of May 28, 1908, provides for the consolidation of claims and their inclusion in a single claim. It is otherwise of no importance.

It will be observed that the only substantial difference between the sections of the Revised Statutes and the act extending them to Alaska is that by the former the right of location is granted to one or those "who have opened *and improved*" a mine or mines, and by the latter the grant is to one or those "who have opened *or improved*" a mine or mines.

[2] Petitioner in great volume asserts loca-

\*552

tions under the \*Act of April 28, 1904, to which locations it has succeeded. The facts concerning them are not in dispute; but whether what was done constituted an opening or improvement of mines, and constrained a decision other than that given by the Land Office, is in dispute.

Eight locations were made, all of which were conveyed by the asserted locators to petitioner in March, 1909. Surveys were made of the locations, which surveys were duly examined and filed in the proper land office in Alaska; and in 1909 petitioner paid to the Treasurer of the United States \$10



for each acre surveyed, in the aggregate \$9,905.74, and made application to the then Secretary of the Interior through the local land office for a patent, tendering due proof of the locations of each applicant. Notice was posted.

April 26, 1912, at the local land office (Juneau), under the direction of the Commissioner of the General Land Office, proceedings were instituted against the application of petitioner upon the ground, among others, that neither of the claimants prior to making the locations or at any time thereafter and prior to filing notice of the locations, opened or improved any mine or mines of coal on any of the tracts of land as required by the Act of April 28, 1904.

Proofs were taken upon the charges, and the register and receiver sustained them and decided and recommended that the application for a patent be rejected.

Upon an appeal to the Commissioner the decision of the local officers was approved after a circumstantial review of the case; and again, upon appeal from the Commissioner's decision, by the Secretary of the Interior.

All of the officers decided that the acts of Congress contemplated as a basis of a valid location the opening and developing of a producing mine of coal and that work performed upon a claim for prospecting purposes does not fulfill the requirement. And that such was the character of the work done upon the

\*553

claims in question was the de\*duction of the officers. "Shallow surface cuts and openings" the work was denominated, and not made "for the purpose of the opening or improving of a producing coal mine or mines."

The characterization, purpose and effect thus ascribed to the work of the claimants are contested, and it is insisted that the amount and effect of the work done constituted an opening and improving of mines and constrained an opposite conclusion and judgment from that of the Land Office, and it is insisted, indeed, that a contrary conclusion was constrained not only by the provisions of the statutes but by previous rulings of the department, under the assurance of which the locations were made and thereby acquired the quality of vested rights to be recognized by the issue of patent as a matter of course—an irresistible right, therefore, having legal remedy in mandamus. It is hence insisted that:

"The respondent [Secretary of the Interior] and his said subordinates have erred, not in the facts, but in their interpretation and construction of the acts of Congress and of the law pertaining to coal mines in or under public lands of the United States in Alaska and to the rights of location, application and patent thereof by locators and their assigns \* \* \* and thereby exceeding his and their powers and jurisdiction.

The contention is repeated in petitioner's brief in various ways and illustrations. Cases

besides are cited with the assertion that in such situation there is no room for the exercise of "discretion," but that it is the imperative duty of the Secretary to issue a patent, the right to it having become vested.

Undoubtedly there may be cases in which rights had actually accrued and nothing remained to the Secretary but their recognition, and counsel have collected and urged such as they deem in point;<sup>1</sup> but the present

\*554

case lacks \*their essential condition. The decision of the local land officers and that of the Commissioner and Secretary disproves the assumption that counsel make that there was only an interpretation and construction of the acts of Congress. On the contrary there was a painstaking consideration and review of the evidence and a determination of its probative strength, and the deduction was that what was done was for prospecting purposes merely and did not satisfy the requirements of the acts of Congress—a purpose to open or improve a mine or mines. And necessarily there is a difference in the purposes, a difference between a mere discovery or exposition of a vein of mineral and its development. Counsel's contention confounds the difference and insists that it is established by the rulings in prior cases in the department that a mine is opened or improved by an "actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal, which is the coal mine." And this, it is contended, has become a principle of decision and has the insistent quality of stare decisis—commanding a specific conclusion, superseding by its automatism any discretionary function in the land officers.

It is not necessary to review the cases. It is enough to say that they have not the inflexibility ascribed to them. And this can be illustrated. Counsel speak of exposition of a vein by a "cut or tunnel." How deep or extensive must either be to invoke the principle? And is the principle confined to such or is it applicable whatever the kind or extent of the work—by any disturbance of the surface or without any disturbance if the

\*555

vein be above the sur\*face? Manifestly judgment in all cases must be exercised—judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law.

In *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074, it was said that Congress has constituted the Land

<sup>1</sup> *Cudney v. Flannery*, 1 L. D. 165; *M., K. & T. Ry. v. Buck* (L. D. unreported); *Miner v. Mariott*, 2 L. D. 709; *Milne v. Ellsworth*, 3 L. D. 213; *Henry W. Fuss*, 5 L. D. 167; *Oliver v. Thomas*, 5 L. D. 289; *Watts v. Forsyth*, 5 L. D. 624; *Williams v. Loew*, 12 L. D. 297; *James B. Weaver*, 35 L. D. 553; *Roy McDonald*, 36 L. D. 205; *Oliver v. Bates*, 36 L. D. 423; *Bertram C. Noble*, 43 L. D. 75; *Fisher v. Heirs of Rule*, 43 L. D. 217; *Siletz Indian Lands*, 42 L. D. 244; *Rough Rider and Other Lode Mining Claims*, 42 L. D. 584.



Department the administrator of the public lands and for the discharge of this duty invested it with judicial functions which are not subject to review by injunction or mandamus. This was repeated and applied in *Ness v. Fisher*, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

[3] Counsel contest the application of these cases and distinguish them from that at bar by the difference between ministerial and judicial action, and assert:

"That the Secretary has essentially altered the law by converting the essential terms of it, upon which our rights are based, to terms of another meaning, and that that is an arbitrary act which the courts can control and overrule."

If the accusation were true the conclusion might follow; but the accusation is not true. We rest on this declaration. It would extend this opinion too much to trace through the ingenuity of counsel's reasoning in a very long brief and the citation and analysis of many cases the distinction they rely on, that is, the distinction between formal and discretionary action. Undoubtedly there is that distinction. *Lane, Secy., v. Hoglund*, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066. But where there is discretion, as we think there is in this case, even though its conclusion be disputable, it is impregnable to mandamus. *Riverside Oil Co. v. Hitchcock and Ness v. Fisher*, supra.

Judgment affirmed.

(250 U. S. 566)

**PENNSYLVANIA R. CO. v. PUBLIC SERVICE COMMISSION OF COMMONWEALTH OF PENNSYLVANIA et al.**

(Argued Oct. 24, 1919. Decided Nov. 10, 1919.)

No. 53.

**1. PUBLIC SERVICE COMMISSIONS §6 — NO GRANT BY STATE OF POWER TO VIOLATE LAWS OF UNITED STATES.**

Whatever powers a state may deny to its Public Service Commissions, it cannot give them power to do what laws of the United States forbid, whether their action be called administrative or judicial.

**2. COMMERCE §8(1)—STATES MAY NOT SUPPLEMENT FEDERAL REGULATIONS OF INTERSTATE COMMERCE.**

When the United States has exercised its exclusive powers over interstate commerce, so far as to take possession of the field, the states no more can supplement its requirements than they can annul them.

**3. COMMERCE §8(4)—OCCUPATION OF REGULATION FIELD BY CONGRESS EXCLUDING STATE REGULATION.**

In view of federal Safety Appliance Act (Comp. St. §§ 8605-8612) and the regulations of the Interstate Commerce Commission, Act Pa. June 19, 1911 (P. L. 1054) § 7, requiring the

last car of every train to be equipped at its rear end with a platform 30 inches in width, guard rails, and steps, could not apply to trains in interstate commerce; the field of regulation having been occupied by the federal authorities.

Mr. Justice Clarke dissenting.

In Error to the Superior Court of the State of Pennsylvania.

Proceeding by the Public Service Commission of the Commonwealth of Pennsylvania and others against the Pennsylvania Railroad Company. From an order of the Commission, the Railroad Company appealed to the Superior Court of Pennsylvania, which sustained the order (67 Pa. Super. Ct. 575), and, after appeal to the Supreme Court of Pennsylvania was refused, the Railroad brings error. Judgment reversed.

\*567

\*Messrs. Frederic D. McKenney, of Washington, D. C., and Francis I. Gowen, of Philadelphia, Pa., for plaintiff in error.

Messrs. William N. Trinke, of Philadelphia, Pa., G. F. Snyder, of Washington, D. C., and Berne H. Evans, of Harrisburg, Pa., for defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This case was begun by a complaint to the Public Service Commission of Pennsylvania that the plaintiff in error, the Pennsylvania Railroad, ran a specified train the last car of which was not equipped at its rear end with a platform thirty inches in width, guard rails and steps, as required by a statute of Pennsylvania. Act of June 19, 1911 (P. L. 1054) § 7. The train was moving in interstate commerce. The Railroad Company admitted the facts but contended that it was not bound by the statute because the rear car was a mail car constructed in accordance with the regulations of the Post Office Department, and because the Government of the United States had assumed control of the matter so far as to exclude such intermeddling on the part of a State. The Commission made an

\*568

order that the Railroad Company should operate its train with the rear end of the rear car equipped as required by the state law. The Railroad Company appealed to the Superior Court, setting up that the order violated the commerce clause of the Constitution (Art. 1, § 8) and that in view of the federal legislation and rules, including the order of the Interstate Commerce Commission dated March 13, 1911, and made under the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. §§ 8605-8612]), and other matters referred to, the State Commission had no power to do what it did.

[1] The Superior Court sustained the order holding itself bound by what it took to be the decision of the Supreme Court of Pennsylvania R. R. Co. v. Ewing, 241 Pa. 581, 88

Atl. 775, 49 L. R. A. (N. S.) 977, Ann. Cas. 1915B, 157, to the effect that nothing had been done by the United States inconsistent with the continued effect of the state law. An appeal to the Supreme Court was refused. On the strength of this it now is argued that the refusal must have been upon the ground that the Commission was a purely administrative body; that it had no judicial power to declare the statute unconstitutional; that therefore no question of the constitutionality of the Act was before the Superior Court, and that this is implied because an appeal to the Supreme Court was a matter of right if the case had involved such a question. But whatever powers a State may deny to its commissions it cannot give them power to do what the laws of the United States forbid, whether they call their action administrative or judicial. The Superior Court treated the question as open. The Supreme Court merely denied an appeal upon a point that probably was thought to have been decided already by the Court.

[2] We pass to the merits of the case. If all that had been done on behalf of the United States in the way of regulation had been to determine how mail cars should be built, and to exclude a thirty-inch platform, it might be said that the state law could be

\*569

obeyed by putting a different \*car at the end of the train. It would be a tax upon the railroad when the company wished to run a mail train wholly made up of mail cars, but it could be done and it is not necessary to say that the State could not require it. But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them. *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 446, 35 Sup. Ct. 304, 59 L. Ed. 661; *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 57 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139. In the present instance the rules for the construction of mail cars, admitted to be valid, not only exclude the wide platform but provide an equipment for them when used as end cars. The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for "Caboose Cars without Platforms." Caboose cars constantly are used as end cars and these pages like the Post Office order as to mail cars recognize the lawfulness of an end car such as the Pennsylvania statute forbids.

[3] The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that be-

longs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject-matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need.

Judgment reversed.

\*570

\*Mr. Justice CLARKE dissenting.

Of course I agree with the majority of the court that if the United States had taken possession of the field involved in this controversy, the State could not supplement or annul its requirements or regulations, and it is because it seems to me clear that it has done nothing of the kind that I dissent from the conclusion of the court.

The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or manned, or moved, so far as I know; certainly there is nothing in the record in this case to indicate that it has done so.

The section of the State statute held invalid has to do, not with individual cars, but with high speed trains of cars in operation, and it does not prescribe what the construction of mail or express cars shall be, but only that the rear car of trains made up of mail or express cars shall be equipped with a platform as prescribed, with "exits free from obstruction." It may be a mail car, or an express car, or a passenger coach or a caboose; the only requirement is that it shall have a platform with guard rail and steps.

For the reason that federal authority had not occupied the field, this court has upheld state laws prescribing the number of men who must be employed to operate trains, *Chicago, R. I. & Pac. Ry. Co. v. State of Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290, the manner in which the cars of passenger trains shall be heated, *N. Y., N. H. & H. Rd. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, the kind of headlight which engines shall carry, *Atlantic Coast Line Rd. Co. v. State of Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312, and that trainmen shall be subject to state examination as to their qualifications, *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, *Nashville, &c., Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352.

In this case the action of the court is rested chiefly on the single circumstance that

\*571

the Interstate Commerce \*Commission has prescribed requisites for "Caboose Cars without Platforms," and since caboose cars are constantly used as end cars, therefore it is concluded the Commission recognizes as law-



ful a type of end car which the state statute condemns.

If the construction prescribed for "Cabooses Cars without Platforms" at all resembled or was even approximately the equivalent of the construction of express or mail cars in the respects essential to the safety and promptness of service on the rear end of fast trains, or if it appeared that such cabooses are or could be used on such trains, the inference might be justified, but the difference between the two is radical and fundamental. As thus: The illustrations in the record show that mail and express cars have only narrow stirrups and single handholds at the side doors and at their ends, and the ends are equipped with vestibule frames, which render access difficult and dangerous to the brake wheel and markers (signal lights and flags) and to the handholds and stirrups for mounting or alighting. But the requisites prescribed for a "Cabooses without Platform" are a curved and a straight handhold on opposite sides of each side door and "Side-Door Steps" under each door, with a minimum length of five feet, a minimum width of six inches, a minimum height of backstop of three inches, and hung a maximum height of only twenty-four inches from the top of rail. Such handholds, with such a long, wide and lowhanging step give facilities for mounting or alighting from such a caboose, when in motion, comparable in safety to those of an end platform, and are obviously much better and safer than those on mail or express cars.

The importance of rear end signals cannot be overstated, yet the construction of the ends of express and mail cars, as shown in the illustrations in the record, is such that such signals can be observed by trainmen with difficulty, when the train is moving, and

\*572

can be put in place \*or removed only with great risk of injury, especially in time of storm of wind or rain or when the precarious foothold on the narrow ledge of the slightly extended end sill is covered with ice or snow. Such danger is entirely obviated by use of the inexpensive platform prescribed by the state statute.

To this we must add that a caboose is used only on slowly moving freight trains, while the state act deals only with fast trains, which start so rapidly that mounting them is especially dangerous for men, who, in the discharge of duty, must usually be on the ground to the last moment, for observation and for signalling, and with whom a few moments in alighting, when the emergency signal is given, may mean the difference between safety and disaster to themselves and to passengers and property on such and other trains.

It was to furnish facilities to employes for prompt and reasonably safe mounting and alighting from these fast trains and for

the discharge of other duties without excessive danger that the statute was enacted, and it seems to me, for the reasons stated, that permitting the use of cabooses without platforms does not cover the rear end requirements of fast express and mail trains, and that the court, in its decision, makes a misapplication of that permission.

It will excite surprise in many minds that the plaintiff railroad company does not make, as it is believed many carriers do make, such provision as this statute requires, or its equivalent, from motives of economy, as a protection, from injury to employes and danger to property as well as from the humanitarian motive so obviously involved.

Believing, as I do, that the section of the State statute is a humane, reasonable and intelligent provision for promoting the safety of employes, passengers and property arising from special conditions on the lines of

\*573

railway, and that \*there is no federal provision having a like purpose, I decline to share in striking down as unconstitutional a law passed by the Legislature of Pennsylvania, approved by the Public Service Commission of that State as reasonable and necessary and, as I think, by its highest court as constitutional.

(250 U. S. 607)

GROESBECK et al. v. DULUTH, S. S. & A. RY. CO.

(Argued Oct. 15, 1919. Decided Nov. 10, 1919.)  
No. 254.

1. APPEAL AND ERROR ⇨781(1) — SUIT TO ENJOIN RATE-FIXING STATUTE NOT RENDERED MOOT BY REPEAL.

Appeal of defendants, in a railroad's suit to enjoin enforcement of a state rate-fixing statute as confiscatory, does not become moot by the repeal of the statute, where the railroad has been required to issue to intrastate passengers receipts agreeing to refund, if the statute should be held valid, the excess fare paid; a large fund having accumulated pending litigation, and the refund coupons being outstanding.

2. CARRIERS ⇨12(6) — ALL DIVISIONS OF ROAD CONSIDERED IN FIXING RATES.

In determining, at a railroad's suit, whether a state statute fixing rates for intrastate passenger traffic is confiscatory, a division of the railroad built, not in a desire to serve local needs, but to establish a through line traversing sparsely settled country between two points, for the convenience largely of interstate traffic, cannot be excluded from the calculation; the state statute (Pub. Acts Mich. 1911, No. 276) having clearly applied the doctrine of averages to the problem of rates.

3. CARRIERS ⇨12(6)—INCLUSION OF INTER-STATE LINE IN DETERMINING WHETHER RATE FIXED WAS CONFISCATORY.

In determining at a railroad's suit whether a state statute fixing rates for intrastate passenger traffic is confiscatory, a line of the railroad originally built by a competitor, paralleling the



railroad's main line and purchased by the railroad's predecessor to avoid competition, now used mainly for heavy freight, the intrastate passenger travel over it being slight, is not to be excluded from the calculation of whether the rate fixed by the statute is confiscatory on any ground that its construction was not required by transportation needs.

**4. CARRIERS** ⇐12(6) — **TRAFFIC OVER CONNECTING ROAD CONSIDERED IN DETERMINING CONFISCATORY CHARACTER OF RATES.**

In determining at a railroad's suit whether a state statute fixing rates for intrastate passenger traffic is confiscatory, the results of operating through passenger trains over another railroad to an important point lying only 14 miles from the lines of the first will not be excluded from the calculation.

**5. CARRIERS** ⇐12(5)—**TREATMENT OF SPECIAL RAILROAD SERVICES AS WHOLE CONSIDERED.**

In determining at a railroad's suit whether a state statute fixing rates for intrastate passenger traffic is confiscatory, the passenger service, including sleeping car, parlor car, and dining car facilities, must be treated as a whole, and not as separate operations, to be charged with their proportion of specific and general expenses, but credited only with amounts received from charges for their specific service.

**6. APPEAL AND ERROR** ⇐842(1) — **PROPER METHOD TO DIVIDE CHARGES BETWEEN FREIGHT AND PASSENGER SERVICES A QUESTION OF FACT.**

In a railroad's suit to enjoin enforcement of a state statute fixing rates for intrastate passenger traffic, what formula the trial court should adopt for dividing charges and expenses common to freight and passenger services, and not capable of direct allocation, is a question of fact, not of law, decision of which will be disturbed on appeal only for clearly apparent error.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit by the Duluth, South Shore & Atlantic Railway Company against Alex. J. Groesbeck and others. From decree for plaintiff, defendants appeal. Affirmed.

\*608

\*Messrs. Leland W. Carr, of Lansing, Mich., Roger I. Wytes, of Grand Rapids, Mich., and Alexander J. Groesbeck, of Detroit, Mich., for appellants.

Messrs. John E. Tracy, of Milwaukee, Wis., and W. D. McHugh, of Omaha, Neb., for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] The Constitution of Michigan (article 12, § 7) authorizes the Legislature to pass laws establishing "reasonable maximum rates of charges for the transportation of passengers and freight." In 1907 it fixed two cents a mile as the maximum intrastate passenger fare on railroads operating in the Lower Peninsula and three cents for those in the upper. By act approved May 2, 1911 (Public Laws No. 276), the two-cent rate was

made applicable to all the railroads of the state whose gross earnings on passenger trains equal or exceed \$1,200 per mile of line operated. Before the statute took effect, the Duluth, South Shore & Atlantic Railway Company, an interstate carrier operating in the Upper Peninsula, brought this suit in the District Court of the United States for the

\*609

Eastern District of Michigan to enjoin the enforcement of the act. The bill alleged that the reduced rate would deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment. The Attorney General and the railroad commissioners of the state, being charged by the law with its enforcement, were made defendants. They denied that the rate was confiscatory; and on this issue the District Court found for the railway. A final decree granting the relief sought was filed February 14, 1918, and an appeal to this court was promptly applied for by the defendants and allowed. Meanwhile, on January 1, 1918, the federal government had taken over the operation of this and other railroads, and is still operating the same. The two-cent rate was never put into effect on this railroad, as a restraining order issued upon the filing of the bill was continued until entry of the final decree. In 1919 the statute attacked here was repealed (Michigan Public Laws No. 382). But the case has not become moot for the following reason: 'On continuing the restraining order the railway was required to issue to all intrastate passengers receipts by which it agreed to refund, if the act should be held valid, the amount paid in excess of a two-cent fare. Later the railway was required to deposit, subject to the order of the court, such amounts thereafter collected. The fund now on deposit exceeds \$800,000, and the refund coupons are still outstanding. In order to determine the rights of coupon holders and to dispose of this fund it is necessary to decide whether the act of 1911 was, as respects this railroad, confiscatory.

The issues of fact were tried below with great thoroughness. The case was referred to a special master to hear the proofs and to report the evidence together with his findings to the court. The report fills 503 pages of the printed record. The transcript of the testimony introduced before him covered more than 12,000 typewritten pages; and there were besides many exhibits. The evi-

\*610

dence before the \*master related largely to the results of the operation of the railroad for the four years ending June 30, 1913. When the case came on for hearing before the District Judge in 1917, supplemental evidence was taken in open court covering the operations of the four additional years ending June 30, 1917. The evidence disclosed the usual diversity of opinion as to the value of the property and as to the proper method of dividing between the passenger and

freight services the common expenses and the charges for property used in common. Upon the whole evidence the court found that the two-cent fare would have resulted in a return on intrastate passenger business of less than 2 per cent. during the six years ending June 30, 1917.

Between the commencement of this suit and the entry of the final decree many of the questions in controversy below have been settled by the decisions of this Court in other cases.<sup>1</sup> The state officials do not deny that there was legal evidence to justify the findings of fact made by the lower court; nor do they request that this court should undertake a general review of the evidence. But they insist that the finding of the district judge of the low return is erroneous, and that the error is due partly to his having included in his calculations property and opera-

\*611

tions which \*should have been excluded, and partly to his having adopted improper formulas for the division of common charges and expenses as between the freight and the passenger services; and that if these specific errors are corrected it will appear that the two-cent fare would have been highly remunerative. These alleged errors must be considered separately.

[2] First. It is contended that the Western Division should be excluded from the calculation. The Duluth, South Shore & Atlantic Railway extends from Sault Ste. Marie to Duluth and has, including branches, 584 miles of line, 475 of which are in Michigan. The Eastern Division serves mainly the iron region; the Central, the copper country; the Western, extending through sparsely settled country from Nestoria, Mich., 101 miles to the Wisconsin state line, and thence to Duluth, serves mainly interstate business.

<sup>1</sup> Interstate Commerce Commission v. Union Pacific Railway Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; The Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; The Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571; Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513, 33 Sup. Ct. 985, 57 L. Ed. 1597; Oregon R. R. & N. Co. v. Campbell, 230 U. S. 525, 33 Sup. Ct. 1026, 57 L. Ed. 1604; Southern Pacific Co. v. Campbell, 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. Ed. 1610; Allen v. St. Louis, I. M. & S. Ry. Co., 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625; Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507; Wood v. Vandalia R. R. Co., 231 U. S. 1, 34 Sup. Ct. 7, 58 L. Ed. 97; Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229; In re Engelhard, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416; San Joaquin, etc., Irrigation Co. v. Stanislaus County, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. Ed. 1041; Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745; Missouri v. Chicago, B. & Q. R. R. Co., 241 U. S. 633, 36 Sup. Ct. 715, 60 L. Ed. 1148; Rowland v. St. Louis & San Francisco R. R. Co., 244 U. S. 106, 37 Sup. Ct. 577, 61 L. Ed. 1022; Darnell v. Edwards, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. Ed. 1317; Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649.

This division is said to have been built not in a desire to serve local needs, but for the purpose of establishing a through line from Duluth to Sault Ste. Marie. The statement, if true, furnishes no reason for excluding it from the calculation. The cost per mile of transporting passengers varies greatly on different parts of the same railroad system according to circumstances, being dependent, among other things, upon the cost of the roadbed and terminals, the grade, the number and character of the trains, the density of traffic and the length of the haul. The justification for a uniform fare per mile is furnished by the doctrine of averages; and the Legislature of Michigan made clear its purpose to apply the doctrine of averages in order to give to travelers the benefit of the two-cent fare on those portions of a railroad on which travel was light and the cost of carrying each passenger necessarily far in excess of two cents a mile. For this act declares:

"That in computing the passenger earnings per mile of any company the earnings and mileage of all branch roads owned, leased, control-

\*612

led or occupied or that may here\*after be owned, leased, controlled or occupied by such company \* \* \* shall be included in the computation [i. e., determining whether the year's gross passenger earnings equal \$1,200 per mile], and the rate of fare shall be the same on all lines owned, leased, controlled or occupied by such company."

In other words, the Legislature has declared that for the purpose of determining the right of an intrastate passenger to travel on any part of the company's lines at the rate of two cents a mile, all of the lines within the state must be treated as one; that those on which travel is light must be averaged with those on which it is dense; and obviously also that those parts of the system which are unprofitable must be taken with those which are profitable. Every part of the railroad system over which the passenger is entitled by the act to ride for a two-cent fare must be included in the computation undertaken to determine whether the prescribed rate is confiscatory. This is true, at least, in the absence of illegality or mismanagement in the acquisition or operation of the division in question; and of such there is not even a suggestion in the record. There is nothing in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 758, 19 Sup. Ct. 804, 43 L. Ed. 1154, or in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446, 23 Sup. Ct. 571, 47 L. Ed. 892, upon which the state officials rely, which is inconsistent with this conclusion.

[3] Second. It is likewise contended that the so-called South Line between Marquette and Ishpeming should be excluded from the calculation. This line which for miles substantially parallels the main line, was originally built as an independent road and was purchased by plaintiff's predecessor in 1884



probably to avoid ruinous competition. It is used mainly for heavy freight, and the intrastate passenger travel over it is light. It is asserted that the construction of this road was not required to supply the transportation needs, and that it would still be possible to carry all existing traffic between Marquette

\*613

and Ishpeming over the main line. What has been said above in regard to the Western Division applies equally to the South Line.

[4] Third. It is contended also that a loss was incurred in operating through passenger trains from Houghton over the Mineral Range Railroad to Calumet and that such loss should be excluded from this calculation. This extension of plaintiff's service was clearly reasonable in view of the importance of Calumet, which lies only fourteen miles from its own lines. It was admitted by the state officials that passengers on the route were, under the act, entitled to travel at the two-cent rate. The fact that the service was furnished by acquiring traffic rights instead of by building an independent line, clearly affords no reason for excluding the results of the operation from the calculation.

[5] Fourth. The further contention is made that the sleeping car, parlor car and dining car services should be treated as separate operations; that they should be charged with their proportion of specific and general expenses but credited only with the amounts received from charges for the specific service; and that no part of the apparent loss on these services should be taken into consideration in determining whether the two-cent fare is confiscatory. In support of this contention it is urged that these services were voluntary; that the law (Michigan Public Acts of 1875, No. 38) permits railroads to make special charges for these services "in addition to the regular passenger fares allowed by law," and that travelers in day coaches must not be allowed to suffer because a railroad fails to make these services compensatory. On American railroads of importance these services have been well-nigh universal for more than a generation; and the charges for them are substantially uniform throughout the country. It would be practically impossible, as it would be obviously unwise, for a railroad like the plain-

\*614

tiff's either to discontinue the services or to increase the charges to cover the cost of the particular service on its line. It is inconceivable that the Legislature of Michigan should have intended in enacting the two-cent fare law to deny to its citizens these customary facilities; and for the purpose of determining whether the act is confiscatory the passenger service including these facilities must be treated as a whole. The fact alleged that these facilities are used mainly by interstate travelers is immaterial.

[6] Fifth. The remaining objection relates to the formula adopted by the lower court for

dividing charges and expenses common to freight and passenger services, and not capable of direct allocation. What method should be pursued in making such division is a very difficult problem to which railroad accountants, the Interstate Commerce Commission and state Railroad Commissions have for years given serious attention.<sup>2</sup> Despite much patient study and the exhibition of great ingenuity no wholly satisfactory method has yet been devised. The variables due to local conditions are numerous; and experience teaches us that it is much easier to reject formulas presented as being misleading than

\*615

to find one apparently adequate. The science of railroad accounting is in this respect in process of development; and it may be long before a formula is devised which can be accepted as satisfactory. For the present, at least, the question what formula the trial court should adopt presents a question, not of law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued.<sup>3</sup>

The decree of the District Court is Affirmed.

<sup>2</sup>The Interstate Commerce Commission upon its organization July 1, 1887, required the railroads to report operating expenses separately as between the freight and passenger services. The difficulties were so great and the results so widely discredited that the requirement was withdrawn as of June 30, 1894. The requirement was restored as of July 1, 1915. In the matter of separating of operating expenses, 30 Interst. Com'n R. 676. In the interval railroad accounting had in this respect made gradual advances. J. M. Talbott, Transportation by Rail (1904); Buell v. Chicago, Milwaukee & St. Paul Railway Co., 1 Wis. R. R. Com. 324 (1907); The Minnesota Rate Cases, 230 U. S. 352, 458-461, 33 Sup. Ct. 729, 57 L. Ed. 1511, 43 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 (1912); 14 American Railway Engineering Association Proceedings, pp. 587, 1128-1135 (1913); Western Passenger Fares, 37 Interst. Com'n R. 1, 12-30 (1915). See M. O. Lorenz Railroad Rate Making, 30 Quarterly Journal of Economics, pp. 221-232 (1916); W. J. Cunningham, The Separation of Railroad Operating Expenses between Freight and Passenger Services, 31 Quarterly Journal of Economics, pp. 200-249 (1917).

<sup>3</sup>The average rate of return for the years 1914-1917 according to the formula adopted by the trial judge was 1.20 per cent. By the use of a formula more favorable to the defendant he found it to be 2.52 per cent. The modified revenue train mile ratio used by the plaintiff showed a loss of over \$100,000 a year; while the gross ton mile ratio proposed by the defendant indicated an average return of at most 5.82 per cent. Of these methods employed by the parties it may be noted that the Interstate Commerce Commission has said:

"The representatives of the state commissions advocated the use of 'gross ton miles' as a basis, while the representatives of the railways favored 'engine ton miles.' The discussion seemed to be somewhat influenced by the possible effect of these respective bases on statistical evidence which might be introduced in passenger rate cases. It may fairly be said that the facts and arguments presented do not warrant the final approval by the Commission of either the gross ton mile or the locomotive ton mile at this time." Rules Governing the Separation of Operating Expenses Between Freight Service and Passenger Service on Large Steam Railways, Effective July 1, 1915, p. 3. These rules are now in process of revision.



(250 U. S. 545)

**CARTAS v. UNITED STATES.**(Submitted [on Motion to Dismiss or Affirm]  
Oct. 13, 1919. Decided Nov. 10, 1919.)

No. 122.

**ARMY AND NAVY**  **15—AUTHORITY OF COMMANDING OFFICER OF UNITED STATES WARSHIP.**

Under Rev. St. § 1624 (Comp. St. § 2961), Articles for the Government of the Navy, art. 8, par. 13 (Comp. St. § 2969), as elucidated by Navy Regulations, § 1020, where the commanding officer of an American Warship in Havana Harbor received on board the equivalent of \$51,000 in American gold coin, no contract arose between the United States and the depositor for the return of the gold to the depositor or his proper agent, so as to render the United States liable for its return to one not the agent of the depositor.

**Appeal from the Court of Claims.**

Suit by Ricardo Cartas against the United States. From a judgment dismissing the petition (48 Ct. Cl. 161), plaintiff appeals. Affirmed.

Messrs. William R. Andrews, and George H. Lamar, both of Washington, D. C., for appellant.

Messrs. Solicitor General Alex. C. King, of Atlanta, Ga., Asst. Attorney General Davis, and George M. Anderson, of Washington, D. C., for the United States.

Mr. Chief Justice WHITE delivered the opinion of the Court.

This suit was brought to recover from the United States \$51,000 in American gold coin

<sup>\*546</sup> with interest from 1869, \*based upon a contract alleged to have been made in that year by the United States as the result of a deposit of the principal sum claimed on a war vessel of the United States. The court, concluding that the facts alleged had no substantial tendency to establish a contract liability on the part of the United States either express or implied, dismissed the suit for want of jurisdiction as its power to adjudge against the United States extended only to obligations of that character. A written opinion was filed, but no finding of facts was made. The United States suggests that the cause be remanded for such finding, but if that course were pursued only the relevant facts could be embraced in the finding and as all such facts were admitted by the court below, the case is open to our consideration and we think there is no necessity for remanding it.

In the petition which was filed in 1902 by Ricardo Cartas, now the appellant, it was alleged that about 33 years before, in January, 1869, Carlos del Costillo deposited on board the American flagship Contoocook, then in Havana Harbor, Spanish gold the equivalent of \$51,000 in American gold coin.

It was alleged that the deposit was evidenced by a receipt given by the American consul at Havana and that the petitioner was the grandson of Costillo and was vested by inheritance with all his rights growing out of the deposit. It was further alleged that the deposit was a contract between the depositor and the United States binding the United States to preserve and return the deposit when demanded, and that it had never been returned; indeed, that no demand for its return had been made during the time which elapsed either by Costillo or by any one authorized to represent him or his interest. Further, it was averred that, although it appeared from the files of the Navy Department that a few months after the deposit was made, that is in April, 1869, it had been returned by the officer commanding the Contoocook.

<sup>\*547</sup>

\*cook to one Arridondo, acting as the agent of Costillo and who was believed by such commanding officer to be fully authorized to receive it, nevertheless the contract obligation on the part of the United States yet existed because said Arridondo was not the agent of Costillo and the United States remained bound to return the said deposit and was not relieved therefrom by the payment made by such officer, although in good faith to a person not entitled to receive it.

Admitting the facts thus alleged, it is indisputable that the only question for decision is the making of the alleged contract with the United States. Indeed, it is to that question and to that question alone that the errors assigned and the contentions advanced to sustain them relate. They all are based upon a power in the commanding officer to contract on behalf of the United States asserted to be conferred by paragraph 13 of article 8 of the "Articles for the Government of the Navy" (Rev. Stat. § 1624 [Comp. St. § 2969]), as elucidated by section 1020 of the Navy regulations. A brief reference to the matters thus relied upon will bring us to the end of the controversy.

The first, the statutory provision, imposes a penalty upon any person in the navy who—"takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, for freight or safe-keeping, or demands or receives any compensation for the receipt or transportation of any other article than gold, silver, or jewels, without authority from the President or the Secretary of the Navy."

The wide discretion possessed by the commanding officer of a naval vessel concerning the receipt on board, for the protection of private rights, of gold, silver or jewels, which it was the obvious purpose of this statute not to modify, since the power as to such articles was excepted from the additional limitation which the statute imposed

\*548

\*as to other articles, affords no ground for the implication that contract obligations would automatically arise as against the United States from the mere exercise by the officer of his discretion. A consideration of the nature of the objects which the provision excepted and the complex and varied character of the conditions which might call for the exercise of the discretion add cogency to this view and at once suggest the incongruity and conflict which must result from the contrary contention.

And this view serves also to dispose of the contention based upon section 1020 of the Navy Regulations which but comprehensively recognizes that compensation due for services rendered as the result of the exercise of the discretion of the officer, to permit the articles in question to be taken on board, should be applied, not for the benefit of the United States in virtue of any contract relation with the subject, but for the benefit of the officers and men designated in the proportions stated in the regulation. Indeed, the co-ordination which the regulation thus manifests between the burden resulting from the exercise of the discretion to receive on board and the distribution of the emoluments arising from its exertion serves to point out the entire unison between the expression of legislative power and the administrative regulation and to make clear the disregard of both which would inevitably result from sustaining the contention as to contract obligation on the part of the United States now relied upon.

Affirmed.

(250 U. S. 573)

PELL et al. v. McCABE et al. (two cases).

(Argued Oct. 16, 1919. Decided Nov. 10, 1919.)

Nos. 311 and 335.

COURTS ⇨ 264(4) — DECREE IN BANKRUPTCY AS BASIS FOR ANCILLARY JURISDICTION.

Decree in the matter of the bankruptcy of a partnership, in which petitions were pending to have T. declared a general partner, and liable as such, that on T. complying with a composition agreement he should be relieved of further liability to the receiver or the estate, and the petitions declaring him liable as a general partner should be dismissed, merely determines that his property shall not be administered in the bankruptcy proceeding, and so does not give ancillary jurisdiction to the District Court to enjoin action against him for fraud of the firm thereafter discovered.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by Stephen H. P. Pell and others against W. Gordon McCabe, Jr., and another.

Decree of District Court dismissing bill (254 Fed. 356) was modified and affirmed by the Circuit Court of Appeals (256 Fed. 512), and complainants bring certiorari to and appeal from the Circuit Court of Appeals. Appeal dismissed, and decree affirmed.

\*574

\*Messrs. Lindley M. Garrison, Emanuel J. Myers, and Gordon S. P. Kleeberg, all of New York City, for petitioners.

Messrs. William St. John Tozer, of New York City, and Henry Buist, of Charleston, S. C., for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought in the District Court of the United States for the Southern District of New York, by persons formerly doing business as partners under the name S. H. P. Pell & Co., to restrain the defendants from proceeding with a suit against them in South Carolina charging them with fraud in partnership transactions in cotton and seeking to recover a million and a half of dollars. The bill was dismissed on demurrer for want of equity by the District Court, 254 Fed. 356, and for want of jurisdiction by the Circuit Court of Appeals, 256 Fed. 512. It is brought here by certiorari (No. 311) and by appeal (No. 335).

The ground of jurisdiction set up is that the bill is ancillary to proceedings in bankruptcy against S. H. P. Pell & Co. in the same district. The present plaintiff Thompson was the only party served in the South Carolina suit and he alleges that he was a special partner under the laws of New York, that he was adjudicated not to be liable as a general partner in the bankruptcy proceedings and that the Court had ancillary jurisdiction to make its decree respected. The other partners set up a discharge under

\*575

a \*composition but as they were not served with process in South Carolina the only question raised before us is whether Thompson can maintain the bill.

The bill discloses the following facts: After the appointment of receivers in the bankruptcy proceedings petitions were filed to have Thompson declared a general partner and adjudicated a bankrupt with the other members of the firm. Later an offer of composition was made by the firm in consideration of the discharge of the bankrupts from their debts and the release of Thompson from liability to S. H. P. Pell & Co. and to any creditor of the firm who should assent to the composition. By the terms of the composition Thompson gave up a scheduled claim of over three million dollars and assumed obligations of over two million dollars for which property of his was pledged. Pursuant to this offer an agreement was made between Thompson and the receivers by which Thompson accepted the composition and agreed to



pay the last mentioned obligations and the receiver agreed to turn over the pledged securities to him, he undertaking in case it should be adjudged that he was a general partner to hold the equities in the same as trustee for the estate—all conditioned upon the Court making an order approving the contract. The order was made on January 6, 1915. On January 25, 1915, the composition was declared to be for the best interests of his estate and the creditors thereof, it and the arrangement with Thompson were confirmed, and it was decreed that on his complying with its terms he should be "relieved of any further liability to the said receiver or the estate by reason of the order heretofore entered by this Court dated January 6, 1915 or otherwise." It was further decreed that the petitions to have Thompson declared liable as a general partner be dismissed. The defendants had been notified of the bankruptcy and the appointment of receivers, had paid one claim made against them for the estate and had disputed another which

\*576

is now the subject \*of a suit in New York, but they did not appear in the bankruptcy proceedings, assent to the composition, or attempt to prove a claim.

We believe that we have stated the essential facts relied upon to support the bill. They seem to us not sufficient for that purpose. It is said that in pursuance of a contract sanctioned by the Court there was a settlement with Thompson discharging him from all liability to the firm and anyone claiming under it. We do not perceive that the decree just recited even purports to deal with the defendants' claim, and reading it in connection with the proposal as to Thompson in the offer of composition we find it at least difficult to understand it to have been directed against other creditors than those who assented to the latter. It is argued, to be sure, that the petitioners seeking to charge Thompson as a general partner were dismissed out and out and that that portion of the decree at least must be taken to operate in rem and decide against all the world that he was not one. But it would be going far to say that the dismissal was not to be read with the rest of the decree in determining its scope, especially when it is remembered that the composition bound the parties who brought the petitions thus dismissed. It is altogether probable that the dismissal was by consent. However this may be, the decree only determined as against everybody that Thompson's property should not be administered in the bankruptcy proceedings; it did not conclusively establish as against the present defendants the finding of facts upon which it is supposed to have been based, if there is any reason to suppose that the facts as to his relation to the firm were found. *Gratnot State Bank v. Johnson*, 249 U. S. 246, 39 Sup.

Ct. 263, 63 L. Ed. 587; *Manson v. Williams*, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869.

The claim of the present defendants in their action in South Carolina is based as we have said upon allegations of fraud, and it is further alleged in their complaint that they believed the representations said to be

\*577

fraudulent \*until long after the decree set up here as a bar. If those allegations are proved the composition would not discharge the claim, and of course they were not passed upon in the bankruptcy court. A decree that, as we have tried to show, cannot be taken to deal with the defendants' rights does not give ancillary jurisdiction to the District Court to enforce it against them. The concession by the demurrer that Thompson was a special partner does not affect the scope of the decree, and the jurisdiction depends upon that alone. It is true that if he was only liable as a special partner the South Carolina suit cannot be maintained, but the allegations of fraud open the whole matter and moreover the question here is not whether that suit can be maintained but whether an injunction against it should be issued by the District Court.

The appeal is dismissed and upon the writ of certiorari the decree dismissing the bill is affirmed.

Appeal dismissed.

Decree affirmed.

(250 U. S. 596)

NEW YORK CENT. R. CO. v. BIANCO.  
AMERICAN KNIFE CO. et al. v. SWEETING.  
CLARK KNITTING CO., Inc., et al.  
v. VAUGHN.

(Argued Oct. 22 and 23, 1919. Decided Nov. 10, 1919.)

Nos. 374, 375 and 376.—October Term, 1919.

1. CONSTITUTIONAL LAW §301 — MASTER AND SERVANT §347—PERMITTING AWARD FOR FACIAL DISFIGUREMENT NOT A TAKING WITHOUT DUE PROCESS.

Workmen's Compensation Law of the State of New York, amended and re-enacted by Laws 1914, c. 41 (Consol. Laws, c. 67), and section 15, amended by Laws 1916, c. 622, § 3, to authorize the Industrial Commission in its discretion, in case of an injury resulting in serious facial or head disfigurement, to make such award as it may deem proper and equitable, not to exceed \$3,500, held not to deprive employers ordered to pay such an award of their property without due process of law, in contravention of Const. U. S. Amend. 14; the provision not being unreasonable, arbitrary, or contrary to fundamental right, while the allowance prescribed does not exceed the constitutional limitations on state power.



**2. CONSTITUTIONAL LAW** §301 — MASTER AND SERVANT §347—DETERMINATION BY STATE OF DETAILS AS TO COMPENSATION FOR FACIAL OR HEAD DISFIGUREMENT.

Whether an award to an injured employé for permanent facial or head disfigurement should be made in combination with, or independent of, the compensation allowed for mere inability to work, is a matter of detail for determination by the state, as is also the question whether the compensation should be paid in a single sum or in installments; decision one way or the other not rendering the portion of a state Workmen's Compensation Act unconstitutional as a taking without due process in violation of the Fourteenth Amendment.

Mr. Justice McReynolds dissenting.

In Error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

In the matter of the claims of George Sweeting and others, employés, for compensation under the Workmen's Compensation Law, against the American Knife Company and others, the employers, and the Aetna Life Insurance Company the insurance carrier. From orders of the Appellate Division of the Supreme Court (186 App. Div. 925, 172 N. Y. Supp. 880; 186 App. Div. 926, 172 N. Y. Supp. 921; 186 App. Div. 925, 172 N. Y. Supp. 924), affirming awards of the State Industrial Commission, the employers and insurance carrier appealed to the Court of Appeals of New York, which affirmed (226 N. Y. 199, 123 N. E. 82; 123 N. E. 856, 893), and the employers and insurance carrier bring error. Judgments affirmed.

In No. 374: Mr. Robert E. Whalen, of Albany, N. Y., for plaintiff in error.

In Nos. 375, 376: Mr. William H. Foster, of Syracuse, N. Y., for plaintiffs in error.

Mr. E. C. Aiken, of Albany, N. Y., for Industrial Commission of New York.

\*600

\*Mr. Justice PITNEY delivered the opinion of the Court.

The Workmen's Compensation Law of the state of New York (chapter 816, Laws 1913, as amended and re-enacted by chapter 41, Laws 1914 [Consol. Laws, c. 67]), which was sustained by this court against attacks based upon the Fourteenth Amendment in New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, was amended by Laws 1916, c. 622, among other things by inserting in the fifteenth section, which contains the schedule of compensation for cases of disability, a clause reading as follows:

"In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but

not to exceed three thousand five hundred dollars."

The present writs of error bring up for review three judgments of the Court of Appeals of that state, affirming orders of the Supreme Court, Appellate Division, Third Judicial Department, in which awards based upon this amendment were sustained. The opinion of the Court of Appeals, applicable to all of the cases, is reported under the title of *Matter of Sweeting v. American Knife Co.*, 226 N. Y. 199, 123 N. E. 82.

In each case the commission found accidental injuries sustained by an employé in a hazardous occupation, arising out of and in the course of the employment, and, as a result of the injury, some serious facial or head disfigurement, or both. In each case an award was made on account of such disfigurement irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employé and the character and duration of the disability.

[1] The sole contention here is that the amendment of 1916, as thus carried into ef-

\*601

fect, deprives the respective plaintiffs \*in error of property without due process of law, in contravention of the Fourteenth Amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

In view of our recent decisions sustaining state laws imposing upon employers in the hazardous industries responsibility in one form or another for the consequences of injuries received by employés in the course of the employment in the absence of fault on the employer's part (*New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058), little need now be said.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured

person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow em-

\*602

ployés, and to patrons or custom\*ers. See *Ball v. Wm. Hunt & Sons, Ltd.*, [1912] App. Cas. 496.

But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant's earning capacity. *Matter of Erickson v. Preuss*, 223 N. Y. 365, 368, 119 N. E. 555; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200, 123 N. E. 82. In view of this, and there being no specific finding of such impairment in these cases, it is proper to say that in our opinion the "due process of law" clause of the Fourteenth Amendment does not require the states to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that

provision debar a state from adopting other methods, or a composite of different methods, provided the result be not inconsistent with fundamental rights. As was stated in the Arizona case, 250 U. S. 429, 39 Sup. Ct. 559, 63 L. Ed. 1058:

"If a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine."

And we see no constitutional reason why

\*603

a state may not, \*in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined, it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York Workmen's Compensation Law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon state power.

[2] Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the state to determine. The same is true of the question whether the compensation should be paid in a single sum, or in installments. *Arizona Employers' Liability Cases*, 250 U. S. 400, 429, 39 Sup. Ct. 553, 63 L. Ed. 1058.

Judgments affirmed.

Mr. Justice McREYNOLDS dissents.

(251 U. S. 1)

UNITED STATES v. SOUTHERN PAC. CO.  
et al.(Argued March 5 and 6, 1919. Decided Nov.  
17, 1919.)

No. 179.

1. PUBLIC LANDS 78 — RAILROAD GRANT  
EXCLUDING "MINERAL LANDS" BARS OIL  
LANDS.

The exclusion from a railroad land grant of "all mineral lands," other than those containing coal or iron, embraces oil lands.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral Land.]

2. PUBLIC LANDS 120—CANCELLATION OF  
RAILROAD GRANT OF LANDS KNOWN AS OIL  
LANDS.

Evidence in suit by the government to cancel for fraud a patent to a railroad company for indemnity lands held to entitle it to the relief, as showing that, when the patent was sought and obtained on affidavit that the lands were nonmineral, they were known by the company's officers to be valuable for oil; that is, that the then known conditions were such as to reasonably engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against the Southern Pacific Company and others. Decree of District Court for the United States was reversed by the Circuit Court of Appeals (249 Fed. 785, 162 C. C. A. 19), and the United States appeals. Decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

\*2

\*Messrs. J. Crawford Biggs, of Raleigh, N. C., and Assistant Attorney General Kearful, for the United States.

Messrs. Charles R. Lewers, and William F. Herrin, both of San Francisco, Cal., for appellee.

\*6

\*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to cancel a patent issued December 12, 1904, to the Southern Pacific Railroad Company for eight full and two partial sections of land within the indemnity limits of the grant made to that company by an act of Congress (Act July 27, 1866, c. 278, 14 Stat. 292), it being charged in the bill that the railroad

\*7

company \*fraudulently obtained the patent by falsely representing to the land department that the lands were not mineral but agricultural, when it was known that they were mineral. From the evidence presented the

District Court found that the charge was true and entered a decree of cancellation, and this was reversed by the Circuit Court of Appeals, one judge dissenting. Southern Pac. Co. v. United States, 249 Fed. 785, 162 C. C. A. 19.

[1] "All mineral lands" other than those containing coal or iron were excluded from the grant, and this exclusion embraced oil lands. *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 676-679, 34 Sup. Ct. 907, 58 L. Ed. 1527. As will be seen presently, there can be no doubt that the patent was procured by representing that the lands were not mineral. Whether this representation was false turns upon the character of the lands as known when the patent was sought and obtained. If they then were known to be valuable for oil, as the government asserts they were, they were mineral in the sense of the granting act.

To compensate for losses to the grant within its primary limits the railroad company was entitled to select other lands of like area within the indemnity limits, approval by the Secretary of the Interior being essential to passing the selections to patent. The established mode of making the selections was by presenting at the local land office selection lists designating the lands lost and those selected, with supporting affidavits showing, among other things, that the lands selected were of the character contemplated, that is to say, were not mineral but agricultural. These lists and affidavits would then be examined in that office and in the General Land Office, and ultimately the selections would be passed to the Secretary of the Interior for his action. That course was followed here.

The original list was presented November 14, 1903, but it encountered obstacles which led to the presentation of a substituted list

\*8

covering the same lands on September 6, 1904. Both lists were presented by the company's land agent, Mr. Eberlein, and were accompanied by affidavits made by him stating that the lands selected "are not interdicted mineral," but "are of the character contemplated by the grant," and that "he has caused" them "to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief none of the lands returned in said list are mineral lands." In acting on the substituted list the officers of the Land Department relied upon and gave effect to the statements in the supporting affidavits, and the selections were accordingly approved and passed to patent.

In truth Mr. Eberlein had not examined the lands or caused them to be examined by others. Nor had any examination of them



been made on behalf of the railroad company, save such as is inferable from the conduct of its geologists and others presently to be noticed.

The lands were in the Elk Hills in Kern county, California; were rough, semi-arid and unfit for cultivation; were devoid of timber, springs or running water; and had but little value for grazing. Oil had been discovered in that region as early as 1899, and this had been followed by development and production on an extensive scale. In 1903 and 1904 there were many producing wells about 25 miles to the east and many within a much shorter distance to the west and south, some within 3 or 4 miles. The railroad company was then maintaining a corps of geologists—all informed by experience in the California oil fields—and under their supervision was searching for, developing and producing oil for fuel purposes. In 1902, upon the recommendation of one of its geologists, it withdrew from sale many of its patented lands surrounding and adjacent to those in suit "because they were in or near oil territory," and early in 1903 it entered upon a systematic examination of its

lands in \*that territory "to determine as far as can be done from surface indications and geological structure where oil is to be expected in this region." In a letter to Mr. Kruttschnitt, one of the company's vice presidents, the chief geologist said when about to take up the examination:

"So far as I can judge from the trip I have just made over this territory, this work promises results of greatest value to the company."

The lands in suit were surveyed in 1901 and the approved plat was filed in the local land office in May, 1903. The field notes denominated the lands as mineral and described them as in a mineral district "within which many successful oil wells have been developed." As before stated, the original selection list was presented November 14, 1903. Mr. Kruttschnitt already had written to the company's attorney at Washington requesting that "special attention" be given to securing a patent for the lands when selected, and shortly thereafter Mr. Eberlein wrote to the attorney, saying:

"I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it."

Other letters and telegrams show that this special concern or anxiety persisted until the patent was issued.

In 1903 the company concluded to lease such of its lands as were considered "valuable for oil purposes" to a subsidiary company, which was to be a sort of fuel department and to have charge of the development and production of oil. The geologists

were requested to designate the lands to be thus leased and as a result of their investigation and recommendation several sections adjacent to and some immediately adjoining those in suit were included. The lease was to be signed on behalf of the railroad company by Mr. Eberlein as land agent and was laid before him for that purpose on August 2, 1904. Perceiving at once that its execu-

\*10  
tion would not be in accord with his action in pressing the pending selection list he took the matter up with some of his superiors. To one he said in a letter:

"We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease, and which we have represented as non-mineral in character. Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented. We could not successfully resist a mineral filing after we have practically established the mineral character of the land. I would suggest delay at least until this matter of patent can be adjusted."

To the same officer he protested against the action of the geologists in examining unpatented lands because "it was charging the company with notice." And to another, in New York, he explained "all phases of the matter," with the result that the "impropriety of the lease at that time" and the "very ambiguous position in which we would be placed" were recognized, and he was instructed to withhold his signature and to place and keep all correspondence and papers relating to the lease in a separate and private file not accessible to others. He followed the instruction and the special or secret file remained in his possession "until," as he testified, "it was pried out" at the hearing.

But, notwithstanding what was brought to his attention through the proposed oil lease, Mr. Eberlein continued actively to press the pending selection, and when, about a month later, he presented the substituted selection list it was accompanied by affidavits wherein he repeated his prior representation that the lands were not mineral. After presenting this list he had a conference with the chief geologist which prompted the latter, when writing to a superior officer, to explain that—

"For reasons of policy regarding certain unpatented lands it will be best not to execute the lease \* \* \* at present."

\*11  
\*The lease was placed by Mr. Eberlein in the special or secret file and some time afterward, when an effort was made to find it, he denied all knowledge of it. The denial was brought to the attention of the chief geologist, and he at once wrote to Mr. Eberlein calling attention to the conference just mentioned, and stating:

"You explain that you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger was passed."

The chief geologist was a witness at the hearing and when asked what danger was meant, answered:

"The danger that these lands might be delayed and not be patented because of their mineral character."

All that has been recited thus far is proved so well that it is beyond dispute. Fairly considered, it shows that when the patent was sought and obtained the lands had no substantial value unless for oil mining; that the interest and anxiety displayed by the company's officers in securing the patent were wholly disproportionate to the value of the lands for any other purpose; that the lands lay within a recognized and productive oil region which the company's geologists had been systematically examining to determine in what lands oil was to be expected, and that upon the advice and recommendation of its geologists the company was treating and dealing with adjacent and adjoining lands, of which it was the owner, as valuable for oil. Of course among practical men the character—whether oil or otherwise—of these adjacent and adjoining lands had some bearing on the character of those in suit, and this was given pointed recognition when the company's officers halted the signing of the proposed oil lease pending action on the selection list and caused the correspondence and papers relating to the lease to be secreted in a special and private file.

We think the natural, if not the only, conclusion from \*all this is that in pressing the selection the officers of the railroad company were not acting in good faith, but were attempting to obtain the patent by representing that the lands were not mineral when they believed the fact was otherwise.

The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows: The area called the Elk Hills was about 6 miles wide and 15 long and constituted an anticlinal fold or elongated dome—an occurrence favorable to the accumulation and retention of oil. The lands in suit were about its center. From 5 to 10 miles to the west was the Temblor Range, the main uplift of that region. Along the east flank of that uplift for a distance of 30 miles was a series of outcrops or exposures of Monterey (diatomaceous) shales, the source of oil in California, and porous sandstone in which oil generally finds its ultimate reservoir. These strata were of exceptional thickness

and it was apparent that oil in considerable quantity had been seeping or wasting from the sandstone. The dip of the strata was towards the Elk Hills and there were no indications of any faulting or thinning in that direction. Between the outcrop and the Elk Hills upwards of 200 wells had found the oil-bearing strata and were being profitably operated, several of the wells being on a direct line towards the lands in suit and within 3 or 4 miles of them. In and beyond the Elk Hills were oil seepages and other surface indications of the existence of oil in the underlying strata, one of the seepages being near the lands in suit. Two wells had been sunk in the Elk Hills, but obviously had not gone to an adequate depth and were not productive, although some oil was reached by one.

Geologists and men of wide experience and success in oil mining—all of whom had

\*13 examined that territory and \*some of whom had been familiar with it for years—were called as witnesses by the government and gave it as their opinion, having regard to the known conditions in 1903 and 1904, as just outlined, that the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but as respects the testimony of some it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries and other external conditions upon which prudent and experienced men in the oil-mining regions are shown to be accustomed to act and make large expenditures. And the testimony of some of these witnesses is weakened by the fact that their prior acts in respect of these lands, or others in that vicinity similarly situated, were not in accord with the opinions which they expressed.

[2] After considering all the evidence, we think it is adequately shown that the lands were known to be valuable for oil when the patent was sought and obtained, and by this we mean that the known conditions at that time were such as reasonably to engender



the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify

\*14  
expenditures to that end. See *Diamond Coal Co. v. United States*, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936.

The railroad company places some reliance on the fact that after the presentation of the original selection list and before the substituted one was tendered a special agent of the General Land Office examined the lands and reported them as nonmineral. But there is nothing in this that can help the company. The agent's report was made in another connection and was not considered by the land officers when they approved the selection. It did not relieve the company from showing that the lands selected were not mineral; nor did the company understand that it had any such effect. Mr. Eberlein knew of the report several months before he and other officers of the company became troubled over the proposed oil lease and concluded that, if given publicity, it would endanger the pending selection. Besides, if the report could be considered here, it would be without any real evidential value, for it appears from testimony given by the agent at the hearing that he was not a geologist or familiar with oil mining and that his examination of the lands was at best only superficial.

The company makes the contention that drilling done since the patent was issued has demonstrated that the lands have no value for oil. Assuming, without so deciding, that the contention would help the company if sustained by the evidence, we think it is not sustained. The drilling relied upon was done after 1909 upon lands in the Elk Hills other than those in suit. Several wells were started and not more than three were successful. The three were the only ones that were drilled in favorable locations and to an adequate depth, and they penetrated oil sands of considerable thickness and produced a large quantity of oil, but were shut down for reasons not made clear by the record. They were drilled by an oil company which was

\*15  
controlled by the railroad company. \*The other wells failed for reasons which prevent the outcome from having any significance here. In some the drilling was not carried to an adequate depth because the right to proceed was thought to be uncertain by reason of an executive withdrawal of the lands.

We conclude that the application of prior decisions to the case made by the evidence entitles the government to the relief sought as was held by the District Court. See *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *McCaskill Co. v. United States*, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; *Diamond Coal Co. v. United States*, supra; *Washington Securities Co. v. United*

*States*, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220.

Decree of Circuit Court of Appeals reversed.

Decree of District Court affirmed.

STROUD v. UNITED STATES.\*

(251 U. S. 15)

(Argued Oct. 22, 1919. Decided Nov. 24, 1919.)

No. 276.

1. CRIMINAL LAW —195(1)—TWICE IN JEOPARDY; CONVICTION OF FIRST DEGREE OF OFFENSE.

Relative to defendant being twice put in jeopardy for the same offense, contrary to the Fifth Amendment, conviction on first trial was of first degree murder, notwithstanding recommendation of jury under Criminal Code, § 330 (Comp. St. § 10504), preventing death penalty.

2. CRIMINAL LAW —193—TWICE IN JEOPARDY; JUDGMENT REVERSED WITH AWARD OF NEW TRIAL.

Defendant was not twice put in jeopardy for the same offense, contrary to the Fifth Amendment, where reversal of first conviction, with necessary award of new trial, was invoked by his writ of error.

3. CRIMINAL LAW —121—CHANGE OF VENUE; DISCRETION.

Change of venue on the ground of local prejudice is addressed to the discretion of the trial judge.

4. CRIMINAL LAW —126(2)—CHANGE OF VENUE; ABUSE OF DISCRETION.

Record in a murder prosecution held not to show abuse of discretion in refusing change of venue on the ground of local prejudice.

5. CRIMINAL LAW —1152(2)—JURY —121—QUASHING PANEL; DISCRETION AND REVIEW.

Motion to quash the panel on the ground of jurors being prejudiced by the reading in their presence of a statement of defendant's counsel proposing a plea of guilty of second degree murder is addressed to the discretion of the trial judge; and, the record not showing abuse thereof, refusal of the motion may not be disturbed by the reviewing court.

6. CRIMINAL LAW —1166½(8)—APPEAL; HARMLESS ERROR IN DENIAL OF CHALLENGE FOR CAUSE.

Where defendant, by the statute allowed 20 peremptory challenges, was in fact allowed 22, and it does not appear that any objectionable juror sat on the trial, his right to peremptory challenge was not abridged to his prejudice by erroneous denial of a challenge for cause.

7. CRIMINAL LAW —393(1)—SEARCHES AND SEIZURES —7—EVIDENCE; LETTERS COMING INTO POSSESSION OF PRISON OFFICIALS.

There was neither testimony required of accused nor unreasonable search and seizure in violation of his constitutional rights, where letters written by him while in penitentiary for

\*Rehearing denied 251 U. S. 380, 40 Sup. Ct. 176, 64 L. Ed. —.



a prior offense came into the possession of the penitentiary officials under established practice, and were used against him on the trial.

In Error to the District Court of the United States for the District of Kansas.

Robert F. Stroud was prosecuted by the United States, convicted of murder in the first degree, and brings error. Affirmed.

\*16

\*Messrs. Martin J. O'Donnell and Isaac B. Kimbrell, both of Kansas City, Mo., for plaintiff in error.

Mr. Assistant Attorney General Stewart, for the United States.

Mr. Justice DAY delivered the opinion of the Court.

Robert F. Stroud was indicted for the killing of Andrew Turner. The indictment embraced the elements constituting murder in the first degree. The homicide took place in the United States prison at Leavenworth, Kan., where Stroud was a prisoner and Turner a guard. The record discloses that Stroud killed Turner by stabbing him with a knife, which he carried concealed on his person.

Stroud was convicted in May, 1916, of murder in the first degree, and sentenced to be hanged. Upon confession of error by the United States district attorney the Circuit Court of Appeals reversed this judgment. 245 Fed.

\*17

990, 157 C. C. A. 672. Stroud was \*again tried at the May term, 1917; the jury in the verdict rendered found Stroud "guilty as charged in the indictment without capital punishment." Upon writ of error to this court the Solicitor General of the United States confessed error, and the judgment was reversed; the mandate commanded:

"Such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding."

In pursuance of this mandate the District Court issued an order vacating the former sentence, and ordered a new trial. The trial was had; the jury found Stroud guilty of murder in the first degree as charged in the indictment, making no recommendation dispensing with capital punishment. Upon this verdict sentence of death was pronounced. This writ of error is prosecuted to reverse the judgment.

The case is brought directly to this court because of assignments of error alleged to involve the construction and application of the Constitution of the United States. The argument has taken a wide range. We shall dispose of such assignments of error as we deem necessary to consider in justice to the contentions raised in behalf of the plaintiff in error.

[1, 2] It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added "without capital punishment" to its verdict, and sentence for life imprisonment was imposed. This recommendation was because of the right of the jury so to do under section 330 of the Criminal Code. Act March 4, 1909,

\*18

c. 321, 35 Stat. 1152, 10 U. S. Comp. Stats. \*§ 10504. This section permits the jury to add to the verdict, where the accused is found guilty of murder in the first degree, "without capital punishment," in which case the convicted person is to be sentenced to imprisonment for life. The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for the first degree murder. *Fitzpatrick v. United States*, 178 U. S. 304, 307, 20 Sup. Ct. 944, 44 L. Ed. 1078.

The protection afforded by the Constitution is against a second trial for the same offense. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, and cases cited in the opinion. Each conviction was for murder as charged in the indictment, which, as we have said, was murder in the first degree. In the last conviction the jury did not add the words "without capital punishment" to the verdict, although the court in its charge particularly called the attention of the jury to this statutory provision. In such case the court could do no less than inflict the death penalty. Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. *Trono v. United States*, 199 U. S. 521, 533, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773.

[3-5] It is insisted that the court erred in not granting a change of venue. The plaintiff in error made a motion in the trial court asking such an order. The chief grounds for the application appear to have been that the testimony for the government in the former trials had been printed and commented upon by the local press; that the evidence published was only such as the government had introduced and its wide circulation by the medium of the press created prejudice

in the minds of the inhabitants of Leavenworth county against him, and that this prejudice existed to such an extent that the jury impaneled to try the case, though not inhabi-

\*19

tants of Leavenworth county, were influenced more or less by the prejudice existing in that county against him; that at defendant's last trial the government by issuing pardons to prisoners who claimed to have witnessed the homicide, produced only such witnesses as tended to support its theory of the guilt of the defendant of the crime of first degree murder, and that at the same time the government invoked the rule that prisoners in the penitentiary who witnessed the homicide, being still prisoners under conviction and serving terms of more than one year, were not qualified witnesses on behalf of the defendant; that the cause was set for trial at a special term of the court beginning on May 20, 1918, and on said date the defendant's counsel were engaged in the state of Missouri in the trial of a cause, that the attorneys advised the judge of their inability to be present during the week the case was set for trial; that an affidavit, setting forth the above facts, was filed with the court, praying it not to enter upon the trial; that the counsel for the government submitted an affidavit, in which it was stated that counsel for the defendant, Stroud, stated their wish and desire to escape further responsibility for the conduct of the defense, and expressed their hope that something would occur to make it unnecessary to appear longer in this cause in Stroud's behalf, and proposed that the government consent that the defendant plead guilty to the charge of second degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life; that said statement and affidavit were read in the presence and hearing of the special panel of prospective jurors in open court, said jurors being among those before whom the government proposed to put the defendant upon trial for murder; that at the close of the reading of the affidavit in the

\*20

presence of the prospective jurors, the District Judge stated from the bench that in view of the statements set forth in the affidavit he was compelled to feel that counsel had acted unprofessionally by not being there in court—at least one of them; that said facts were commented upon by the public press of Leavenworth county, and created prejudice against defendant and his attorneys; that defendant never authorized any person or attorney to make any such proposal to attorneys for the government, concerning a plea of guilty, for the reason that the defendant was not guilty of the charge contained in the indictment, or of murder in any degree, and that unless the jurors who had theretofore attended the court during the week of May 20, 1918, were discharged by

order of the court the defendant could not enjoy the right of a public trial by an impartial jury secured to him by the Constitution, and prayed an order transferring the case to another division of the district. The court overruled the motion, except in so far as it asked for an exclusion of inhabitants of Leavenworth county as jurors; to that extent it was sustained. The motion to quash the panel, called to act as jurors, was made on like grounds, and was also overruled.

The division in which Leavenworth county is situated consists of fifty counties, and, after hearing these applications, the District Court excluded persons from the jury who were residents of Leavenworth county, and refused to quash the panel upon the grounds alleged. Matters of this sort are addressed to the discretion of the trial judge, and we find nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment. *Kennon v. Gilmer*, 131 U. S. 22, 24, 9 Sup. Ct. 696, 33 L. Ed. 110.

[6] Certain jurors were challenged for cause upon the ground that they were in favor of nothing less than capital punishment in cases of conviction for murder in the first degree. It may well be that as to one of

\*21

these jurors, one \*Williamson, the challenge should have been sustained. The juror was peremptorily challenged by the accused, and did not sit upon the jury. The statute, in cases of this character, allowed the accused 20 peremptory challenges; it appears that he was in fact allowed twenty-two peremptory challenges. Thus his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground. See *Hayes v. Missouri*, 120 U. S. 68, 71, 7 Sup. Ct. 350, 30 L. Ed. 578; *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80; *Holt v. United States*, 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

[7] Certain letters were offered in evidence at the trial containing expressions tending to establish the guilt of the accused. These letters were written by him after the homicide and while he was an inmate of the penitentiary at Leavenworth. They were voluntarily written, and under the practice and discipline of the prison were turned over ultimately to the warden, who furnished them to the district attorney. It appears that at the former trial, as well as the one which resulted in the conviction now under consideration, application was made for a return of these letters upon the ground that their seizure and use brought them within principles laid down



in *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and kindred cases. But we are unable to discover any application of the principles laid down in those cases to the facts now before us. In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the in-

stitution. Under such circumstances there

was neither \*testimony required of the accused, nor unreasonable search and seizure, in violation of his constitutional rights.

Other objections are raised in the elaborate brief filed in behalf of the plaintiff in error. We do not find it necessary to discuss them. In view of the gravity of the case they have been examined and considered with care, and we are unable to find that any error was committed to the prejudice of the accused. Affirmed.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(250 U. S. 654)

No. 5. *CITY OF BIRMINGHAM*, plaintiff in error, v. *D. J. O'CONNELL*. Nov. 10, 1919. In error to the Supreme Court of the State of Alabama. For opinion below, see 195 Ala. 60, 70 South. 184. Messrs. Samuel D. Weakly and Joseph P. Mudd, both of Birmingham, Ala., for plaintiff in error. Mr. Augustus Benners, of Birmingham, Ala., for defendant in error.

PER CURIAM. Dismissed without costs for want of jurisdiction upon the authority of *Johnson v. State of Tennessee*, 214 U. S. 485, 29 Sup. Ct. 651, 53 L. Ed. 1056; *California v. San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314, 13 Sup. Ct. 876, 37 L. Ed. 747; *Richardson v. McChesney*, 218 U. S. 487, 492, 31 Sup. Ct. 43, 54 L. Ed. 1121; *Stearns v. Wood*, 236 U. S. 75, 78, 35 Sup. Ct. 229, 59 L. Ed. 475; *United States v. Hamburg-American Co.*, 239 U. S. 466, 475, 36 Sup. Ct. 212, 60 L. Ed. 387.

(250 U. S. 653)

No. 44. *Hiram C. HIMES et al.*, trustees, etc., et al., plaintiffs in error, v. *The COMMONWEALTH OF PENNSYLVANIA*. Nov. 10, 1919. In error to the Supreme Court of the State of Pennsylvania. For opinion below, see 257 Pa. 249, 101 Atl. 766. Mr. Edmund Bayly Seymour, Jr., of Philadelphia, Pa., for plaintiffs in error. Messrs. Wm. H. Hargest, Deputy Atty. Gen., and Wm. I. Schaffer, Atty. Gen., for the Commonwealth of Pennsylvania.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39th Statutes at Large, 726 (Comp. St. § 1214).

(250 U. S. 653)

No. 46. *KENTUCKY HEATING COMPANY* et al., plaintiffs in error, v. *The CITY OF LOUISVILLE*. Nov. 10, 1919. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 174 Ky. 142, 192 S. W. 4. Mr. Matthew O'Doherty, of Louisville, Ky., for plaintiffs in error. Messrs. Pendleton Beck-

ley, of New York City, and George Cary Tabb, of Louisville, Ky., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 6 of the act of September 6, 1916, chapter 448, 39th Statutes at Large, 727 (Comp. St. § 1228a).

(250 U. S. 652)

No. 52. *Charles S. ASHLEY*, plaintiff in error, v. *William Cushing WAIT et al.* Nov. 10, 1919. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion below, see 228 Mass. 63, 116 N. E. 961. Messrs. John W. Cummings and Charles R. Cummings, both of Fall River, Mass., for plaintiff in error.

PER CURIAM. Dismissed without costs for want of jurisdiction upon the authority of *California v. San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314, 13 Sup. Ct. 876, 37 L. Ed. 747; *Richardson v. McChesney*, 218 U. S. 487, 492, 31 Sup. Ct. 43, 54 L. Ed. 1121; *Stearns v. Wood*, 236 U. S. 75, 78, 35 Sup. Ct. 229, 59 L. Ed. 475; *United States v. Hamburg-American Co.*, 239 U. S. 466, 475, 36 Sup. Ct. 212, 60 L. Ed. 387.

(250 U. S. 653)

No. 54. *Christopher L. WILLIAMS*, as receiver, etc., et al., appellants, v. *William D. SALTER*. Nov. 10, 1919. Appeal from the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 244 Fed. 126, 156 C. C. A. 554. Mr. Stuart G. Gibboney, of New York City, for appellants. Mr. Lindley M. Garrison, of New York City, for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39th Statutes at Large, 726 (Comp. St. § 1214).

(250 U. S. 651)

No. 90. *CITY OF CHICAGO et al.*, plaintiffs in error, v. *Thomas E. DEMPCY*, as chairman, etc., et al. Nov. 10, 1919. In error to the Supreme Court of the State of Illinois. For



opinion below, see 281 Ill. 257, 117 N. E. 1010. Messrs. W. W. Gurley, Harry P. Weber, and George W. Miller, all of Chicago, Ill., for plaintiffs in error. Messrs. Edward J. Brundage, James H. Wilkerson, and George T. Buckingham, all of Chicago, Ill., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054.

(250 U. S. 679)

No. 217. *The BARBER ASPHALT PAVING COMPANY*, petitioner, v. *William H. WOERHEIDE et al.* Nov. 10, 1919. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 251 Fed. 196, 163 C. C. A. 352. Messrs. Joseph C. Fraley and Henry N. Paul, Jr., both of Philadelphia, Pa., for petitioner. Messrs. George F. Haid, of St. Louis, Mo., and Philip W. Haberman, of New York City, for respondents. Dismissed with costs, on motion of counsel for the petitioner.

(250 U. S. 654)

No. 229. *LOUISIANA NAVIGATION COMPANY, Limited*, plaintiff in error, v. *OYSTER COMMISSION OF LOUISIANA* (now Department of Conservation of Louisiana) et al. Nov. 10, 1919. In error to the Supreme Court of the State of Louisiana. For opinion below, see 143 La. 664, 79 South. 213. Messrs. J. C. Gilmore and Thomas Gilmore, both of New Orleans, La., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39th Statutes at Large, 726 (Comp. St. § 1214).

(250 U. S. 652)

No. 328. *KANSAS CITY*, plaintiff in error, v. *PUBLIC SERVICE COMMISSION OF MISSOURI et al.* Nov. 10, 1919. In error to the Supreme Court of the State of Missouri. For opinion below, see 210 S. W. 381. Mr. Matthew A. Fyke, of Kansas City, Mo., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054, and see *City of Chicago v. Dempcy*, 250 U. S. 651, 40 Sup. Ct. 53, 63 L. Ed. 1189, this day decided.

No. 382. *NATIONAL BRAKE & ELECTRIC COMPANY*, petitioner, v. *Neils A. CHRISTENSEN et al.* Nov. 10, 1919. For opinion below, see 258 Fed. 880. Messrs. John S. Miller, of Chicago, Ill., Thomas B. Kerr, of New York City, and Charles A. Brown and Edward Osgood Brown, both of Chicago, Ill., for petitioner. Messrs. Joseph B. Cotton, of New York City, and Willet M. Spooner and Louis Quarles, both of Milwaukee, Wis., and William R. Rummier, of Chicago, Ill., for respondents. Motion for a writ of prohibition herein denied.

(250 U. S. 658)

No. 415. *PHILADELPHIA & READING RAILWAY COMPANY*, plaintiff in error, v. *Margaret L. HANCOCK*. Nov. 10, 1919. For opinion below, see 264 Pa. 220, 107 Atl. 735. Messrs. Charles Heebner and George Gowen Parry, both of Philadelphia, Pa., for plaintiff in error. Petition for a writ of certiorari herein granted. Further consideration of the motion to dismiss herein postponed to the hearing of the case on the merits.

(250 U. S. 652)

No. 460. *RAINIER BREWING COMPANY*, plaintiff in error, v. *GREAT NORTHERN PACIFIC STEAMSHIP COMPANY*. Nov. 10, 1919. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 255 Fed. 762. Mr. S. J. Wettrick, of Seattle, Wash., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *United States v. Krall*, 174 U. S. 385, 19 Sup. Ct. 712, 43 L. Ed. 1017; *German National Bank v. Speckert*, 181 U. S. 405, 21 Sup. Ct. 688, 45 L. Ed. 926; *United States v. Beatty*, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686; and see *Eichel v. United States Fidelity & Guaranty Co.*, 239 U. S. 629, 36 Sup. Ct. 165, 60 L. Ed. 475.

(250 U. S. 674)

No. 532. *JUNG BACK SING et al.*, petitioners, v. *Edward WHITE*, as Commissioner of Immigration, etc. Nov. 10, 1919. For opinion below, see 257 Fed. 416. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(250 U. S. 658)

No. 552. *The STANDARD FASHION COMPANY*, petitioner, v. *MAGRANE-HOUSTON COMPANY*. Nov. 10, 1919. For opinion below, see 259 Fed. 793. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(250 U. S. 674)

No. 558. *G. E. HOSIER*, petitioner, v. *The UNITED STATES of America*. Nov. 10, 1919. For opinion below, see 260 Fed. 155. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 674)

No. 560. *Peter WEISSENGOFF*, petitioner, v. *George R. DAVIS*, administrator, etc. Nov. 10, 1919. For opinion below, see 260 Fed. 16. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 674)

No. 576. *Walter HEYNACHER*, petitioner, v. *The UNITED STATES of America*. Nov. 10, 1919. For opinion below, see 257 Fed. 61. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 599. October Term, 1918. MINERALS SEPARATION, Limited, et al., petitioners, v. BUTTE & SUPERIOR MINING COMPANY. Nov. 10, 1919. See, also, 250 U. S. 336, 39 Sup. Ct. 496, 63 L. Ed. 1019. Motion to recall mandate and disallow costs denied.

(251 U. S. 537)

No. 59. Bert RUCKER, plaintiff in error, v. Marion A. TATLOW. Nov. 17, 1919. In Error to the Supreme Court of the State of Kansas. For opinion below, see 95 Kan. 695, 149 Pac. 745. Messrs. Joseph G. Waters and Joseph M. Stark, both of Topeka, Kan., for plaintiff in error. Mr. Lee Monroe, of Topeka, Kan., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *United Surety Co. v. American Fruit Produce Co.*, 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(251 U. S. 537)

No. 69. Edward E. O'BRIEN et al., plaintiffs in error, v. The PUBLIC SERVICE COMMISSION OF THE FIRST DISTRICT OF THE STATE OF NEW YORK, etc. Nov. 17, 1919. In Error to the Supreme Court of the State of New York. For opinion below, see 217 N. Y. 61, 111 N. E. 658, which affirms 167 App. Div. 908, 151 N. Y. Supp. 766. Mr. Robert H. Elder, of New York City, for plaintiffs in error. Mr. William P. Burr, of New York City, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *California Powder Works v. Davis*, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; *Sayward v. Denney*, 158 U. S. 180, 183, 15 Sup. Ct. 777, 39 L. Ed. 941; *Harding v. Illinois*, 196 U. S. 78, 86, 25 Sup. Ct. 176, 49 L. Ed. 394; (2) *Thomas v. Iowa*, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782; *Bowe v. Scott*, 233 U. S. 658, 664, 34 Sup. Ct. 769, 58 L. Ed. 1141; and see *El Paso Sash & Door Co. v. Carraway*, 245 U. S. 643, 38 Sup. Ct. 222, 62 L. Ed. 528.

(251 U. S. 537)

No. 75. Margaret SANGER, plaintiff in error, v. The PEOPLE OF THE STATE OF NEW YORK. Nov. 17, 1919. In Error to the Court of Special Sessions of the City of New York for County of Kings, State of New York. For opinion below, see 179 App. Div. 939, 166 N. Y. Supp. 1107. Mr. Jonah J. Goldstein, of New York City, for plaintiff in error. Mr. Harry G. Anderson, of New York City, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *California Powder Works v. Davis*, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; *Sayward v. Denney*, 158 U. S. 180, 183, 15 Sup. Ct. 777, 39 L. Ed. 941; *Harding v. Illinois*, 196 U. S. 78, 86, 25 Sup. Ct. 176, 49 L. Ed. 394; (2) *Thomas v. Iowa*, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782; *Bowe v. Scott*, 233 U. S. 658,

664, 34 Sup. Ct. 769, 58 L. Ed. 1141; and see *El Paso Sash & Door Co. v. Carraway*, 245 U. S. 643, 38 Sup. Ct. 222, 62 L. Ed. 528.

(251 U. S. 538)

No. 78. GULF, COLORADO & SANTA FE RAILWAY COMPANY et al., plaintiffs in error, v. George H. BOWLES. Nov. 17, 1919. In Error to the District Court of the United States for the Southern District of Texas. Messrs. J. W. Terry, of Galveston, Tex., and Alex Britton and Evans Browne, both of Washington, D. C., for plaintiffs in error.

PER CURIAM. Reversed upon the authority of *Louisville & Nashville R. R. Co. v. Rice*, 247 U. S. 201, 38 Sup. Ct. 429, 62 L. Ed. 1071.

(251 U. S. 535)

No. 182. William J. GEARY, plaintiff in error, v. Alice GEARY. Nov. 17, 1919. In Error to the Supreme Court of the State of Nebraska. For opinion below, see 102 Neb. 511, 167 N. W. 778. Mr. T. M. Zink, of Lemars, Iowa, for plaintiff in error. Mr. R. E. Evans, of Dakota City, Neb., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 550)

No. 183. JOSLIN MANUFACTURING COMPANY, plaintiff in error, v. The CITY OF PROVIDENCE et al.;

No. 184. SCITUATE LIGHT & POWER COMPANY, plaintiff in error, v. The CITY OF PROVIDENCE et al.; and

No. 185. Theresa B. JOSLIN, plaintiff in error, v. The CITY OF PROVIDENCE et al. Nov. 17, 1919. In Error to the Supreme Court of the State of Rhode Island. For opinion below, see 103 Atl. 935. Messrs. Robert H. McCarter, of Newark, N. J., and J. Jerome Hahn, Francis I. McCanna, and Alfred G. Chaffee, all of Providence, R. I., for plaintiff in error. Messrs. Albert A. Baker and Elmer S. Chace, both of Providence, R. I., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Haseltine v. Bank*, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117; *Schlosser v. Hemphill*, 198 U. S. 173, 25 Sup. Ct. 654, 49 L. Ed. 1000; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 418, 35 Sup. Ct. 625, 59 L. Ed. 1027; *Bruce v. Tobin*, 245 U. S. 18, 19, 38 Sup. Ct. 7, 62 L. Ed. 123; and see *Collard, Adm'r. v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 246 U. S. 653, 38 Sup. Ct. 336, 62 L. Ed. 922. Petition for certiorari denied.

(251 U. S. 536)

No. 286. J. W. THOMPSON, plaintiff in error, v. R. B. DAY, Sheriff and Tax Collector, et al. Nov. 17, 1919. In Error to the Supreme Court of the State of Louisiana. For opinion below, see 143 La. 1086, 79 South. 870. Mr. William C. Marshall, of St. Louis, Mo., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Goodrich v.*



Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *United Surety Co. v. American Fruit Produce Co.*, 233 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. St. 191, 63 L. Ed. 550.

(251 U. S. 536)

No. 354. NATIONAL COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS, plaintiff in error, v. Catherine A. NICODEMUS. Nov. 17, 1919. In Error to the Supreme Court of the State of Colorado. Mr. George P. Steele, of Denver, Colo., for plaintiff in error. Mr. Fred Herrington, of Denver, Colo., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 550)

No. 410. BIRMINGHAM TRUST & SAVINGS COMPANY, as Trustee, etc., petitioner, v. UNITED STATES of America. Nov. 17, 1919. For opinion below, see 258 Fed. 562. Mr. John P. Tillman, of Birmingham, Ala., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 551)

No. 427. Michael TOMASCO, petitioner, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. Nov. 17, 1919. For opinion below, see 256 Fed. 14. Mr. George Clinton, of Buffalo, N. Y., for petitioner, Mr. Maurice C. Spratt, of Buffalo, N. Y., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(251 U. S. 536)

No. 438. Rudolph Ernest TIEDEMANN, plaintiff in error, v. Gertrude Eleanor TIEDEMANN. Nov. 17, 1919. In Error to the Supreme Court of the State of New York. For opinions below, see 123 N. E. 891, which denies reargument, 225 N. Y. 709, 122 N. E. 892, which affirms judgment 158 N. Y. Supp. 851. Messrs. Nash Rockwood, of Saratoga Springs, N. Y., and Homer S. Cummings, of Stamford, Conn., for plaintiff in error. Messrs. Elijah N. Zoline and Louis J. Vorhaus, both of New York City, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 551)

No. 466. ARMOUR & COMPANY et al., petitioners, v. TEXAS & PACIFIC RAILWAY COMPANY et al. Nov. 17, 1919. For opinion below, see 258 Fed. 185. Messrs. James Manson McCormick and Francis Marion Etheridge, both of Dallas, Tex., for petitioners.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 552)

No. 530. W. L. BRUCE, as Administrator, etc., et al., petitioners, v. William TOBIN. Nov. 17, 1919. For opinion below, see 171 N. W. 603. Petition for a writ of certiorari to the Supreme Court of the State of South Dakota denied.

(251 U. S. 552)

No. 557. The KANSAS CITY SOUTHERN RAILWAY COMPANY, petitioner, v. Robert W. SMITH. Nov. 17, 1919. For opinion below, see 213 S. W. 481. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(251 U. S. 551)

No. 561. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, petitioner, v. Grace F. FULLER, as Administratrix, etc. Nov. 17, 1919. For opinions below, see 181 Pac. 338, 991. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied.

(251 U. S. 548)

No. 568. UNION PACIFIC RAILROAD COMPANY, petitioner, v. James J. E. BURKE. Nov. 17, 1919. For opinions below, see 178 App. Div. 783, 166 N. Y. Supp. 100. Petition for a writ of certiorari to the Supreme Court of the State of New York granted.

(251 U. S. 551)

No. 572. FREY & SON, Incorporated, petitioner, v. WELCH GRAPE JUICE COMPANY. Nov. 17, 1919. For opinion below, see 261 Fed. 68. Messrs. Charles Markell and Horace T. Smith, both of Baltimore, Md., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(251 U. S. 563)

No. 120. A. A. AUSPLUND, plaintiff in error, v. The STATE OF OREGON. Nov. 18, 1919. In Error to the Supreme Court of the State of Oregon. For opinions below, see 87 Or. 649, 171 Pac. 395, 86 Or. 121, 167 Pac. 1019. Mr. John F. Logan, of Portland, Or., for plaintiff in error. Dismissed, per stipulation, on motion of Mr. W. H. Evans for the defendant in error.

(251 U. S. 563)

No. 113. E. VIEGELMANN & COMPANY, petitioner, v. The INSULAR COLLECTOR OF CUSTOMS. Nov. 19, 1919. Mr. Timothy T. Ansberry, of Washington, D. C., for petitioner. On petition for a writ of certiorari to the Supreme Court of the Philippine Islands. Dismissed for want of prosecution.

(251 U. S. 564)

No. 149. The HARTFORD POSTER ADVERTISING COMPANY, appellant, v. Thomas E. EGAN, chief of the State police, etc. Nov. 21, 1919. Appeal from the District Court of the United States for the District of Connecticut. Mr. Edward F. McClennen, of Bos-



ton, Mass., for appellant. Mr. Lucius F. Robinson, of Hartford, Conn., for respondent. Dismissed without costs to either party, per stipulation.

(251 U. S. 538)

No. 188. Georgia M. HOUSTON, administratrix, etc., plaintiff in error, v. SEABOARD AIR LINE RAILWAY COMPANY. Nov. 24, 1919. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 123 Va. 290, 96 S. E. 270. Mr. R. Randolph Hicks, of Norfolk, Va., for plaintiff in error. Mr. G. Hatton, of Portsmouth, Va., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 539)

No. 334. SOUTHERN PACIFIC COMPANY, plaintiff in error, v. Leo L. D'UTASSY. Nov. 24, 1919. In error to the Supreme Court of the State of New York. For opinion below, see 225 N. Y. 694, 122 N. E. 879, which affirms 174 App. Div. 547, 161 N. Y. Supp. 222. Mr. Fred H. Wood, of New York City, N. Y., for plaintiff in error. Messrs. Wilson E. Tiple and Arthur W. Clement, both of New York City, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214). See writ of certiorari denied, 1918 term, No. 944, 250 U. S. 639, 39 Sup. Ct. 490, 63 L. Ed. 1184.

(251 U. S. 552)

No. 449. Frank SHAFFER, petitioner, v. The UNITED STATES of America. Nov. 24, 1919. For opinion below, see 255 Fed. 886. Messrs. David A. Baer, of Washington, D. C., and John J. Sullivan, of New York City,

for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 553, 552)

No. 544. MISSOURI PACIFIC RAILROAD COMPANY, plaintiff in error, v. G. W. BOLLIS. Nov. 24, 1919. In error to the Supreme Court of the State of Tennessee. Messrs. J. W. Canada and Prather McDonald, both of Memphis, Tenn. (Edward J. White, of St. Louis, Mo., of counsel), for petitioner. Messrs. Julian C. Wilson and Walter P. Armstrong, both of Memphis, Tenn., for defendant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 488, § 2, 39 Stat. 726 (Comp. St. § 1214). Petition for writ of certiorari herein denied.

(251 U. S. 552)

No. 563. INTER-URBAN RAILWAY COMPANY et al., petitioners, v. Mrs. Fred SMITH. Nov. 24, 1919. For opinion below, see 171 N. W. 134. Mr. Frank J. Hogan, of Washington, D. C., and J. L. Parrish, of Des Moines, Iowa, for petitioners. Mr. R. M. Haines, of Des Moines, Iowa, and Messrs. Dunshee, Haines & Brody, of Des Moines, Iowa, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

(251 U. S. 563)

No. 598. Bascom C. THOMPSON, petitioner, v. The UNITED STATES of America. Nov. 24, 1919. For opinion below, see 258 Fed. 196. Messrs. Thomas T. Fauntleroy, Patrick H. Cullen, and Charles M. Hay, all of St. Louis, Mo., for petitioner. Mr. R. P. Stewart, Asst. Atty. Gen., and W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(251 U. S. 108)

**EVANS v. NATIONAL BANK OF SAVANNAH.**

(Argued Nov. 11 and 12, 1919. Decided Dec. 8, 1919.)

No. 67.

**1. BANKS AND BANKING** ⇨270(1)—DETERMINATION OF POWERS OF NATIONAL BANK IN RESPECT OF DISCOUNTS.

The powers of a national bank in respect of discounts, whether transactions by it are usurious, and the consequent penalties therefor must be ascertained on a consideration of the National Bank Act.

**2. BANKS AND BANKING** ⇨270(3)—USURY; "DISCOUNT" BY NATIONAL BANK.

In view of Civ. Code Ga. 1910, §§ 3426, 3427, 3436, establishing a maximum interest rate of 8 per cent., permitting discount at the state rate, under Rev. St. §§ 5136, 5197, 5198 (Comp. St. §§ 9661, 9758, 9759), a national bank in the state did not subject itself to the penalties prescribed for taking usury by discounting short time notes in the ordinary course of business and charging therefor at the rate of 8 per cent. per annum in advance, the federal statutes completely defining what constitutes taking of usury by a national bank, and referring to the state law only to determine the maximum permitted rate, while to "discount" implies reservation of interest in advance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discount.]

Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

On a Writ of Certiorari to the Court of Appeals of the State of Georgia.

Suit by S. F. Cooper and others, receivers of the Citizens' & Screven County Bank, against the National Bank of Savannah. To review a judgment sustaining a demurrer to the amended petition, plaintiff brought error to the Court of Appeals of Georgia, which affirmed (Cooper v. Same, 21 Ga. App. 356, 94 S. E. 611), and Thomas J. Evans, sole surviving receiver of the Citizens' & Screven County Bank, petitions for certiorari. Affirmed.

Mr. Frederick T. Saussy, of Savannah, Ga., for petitioner.

Messrs. Edward S. Elliott and William Garrard, both of Savannah, Ga., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The court below rightly construed the pleadings as presenting only one substantial

federal question: Did \*respondent subject itself to the penalties prescribed for taking usury by discounting short-time notes in the ordinary course of business and charging

therefor at the rate of eight per centum per annum in advance? And we think it correctly answered that question in the negative.

[1] Respondent is a national bank. Its powers in respect of discounts, whether transactions by it are usurious and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act. Act June 3, 1864, c. 106, 13 Stat. 99, 101, 108; R. S. § 5133 et seq. (Comp. St. § 9658); Farmers' & Mechanics' Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; Barnett v. National Bank, 98 U. S. 555, 558, 25 L. Ed. 212; Haseltine v. Central Bank of Springfield, 183 U. S. 132, 134, 22 Sup. Ct. 50, 46 L. Ed. 118. Section 8 declares:

"That every association formed pursuant to the provisions of this act \* \* \* may elect and appoint directors, \* \* \* and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits. \* \* \*"

Section 30, printed in the margin,<sup>1</sup> contains regulations \*presently important in respect of usury. Among other things, it provides:

"That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more. \* \* \*"

All these provisions were carried into sections 5136, 5197, and 5198, Revised Statutes

<sup>1</sup> Sec. 30. That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. 13 Stat. 108.

(Comp. St. §§ 9661, 9758, 9759), set out below.<sup>2</sup>

\*111

\*The National Bank Act establishes a system of general regulations. It adopts usury laws of the states only in so far as they severally fix the rate of interest. *Farmers' & Mechanics' Bank v. Dearing*, supra; *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742; *Haseltine v. Central Bank of Springfield*, supra.

The Georgia Code (1910) contains the following:

"Sec. 3426. *What is Lawful Interest.* The legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate

\* R. S. § 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

R. S. § 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

R. S. § 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided such action is commenced within two years from the time the usurious transaction occurred. [That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 320.]

must be specified in writing, but in no event to exceed eight per cent. per annum.

"Sec. 3427. *What is Usury.* Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest."

"Sec. 3436. *Beyond Eight Per Cent. Interest*

\*112

*Forbidden.* \*It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

Construing these sections, in *Loganville Banking Co. v. Forrester* (1915) 143 Ga. 302, 303, 84 S. E. 961, 962 (L. R. A. 1915D, 1195), the Georgia Supreme Court held that charges reserved in advance by a state bank at the highest permitted rate of interest on a loan, whether short or long time, constitute usury, and said:

"If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. \* \* \* But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is an usurious one."

Earlier opinions by the court express a different view of the same sections. In *Mackenzie v. Flannery* (1892) 90 Ga. 590, 599, 16 S. E. 710, 713, it is said:

"Nor can we determine, without reference to the evidence, whether the taking of eight per cent. interest in advance by way of discount was usurious. Eight per cent. was legal if agreed upon in writing; \* \* \* and it is well settled that the taking of interest in advance on short loans in the usual and ordinary course of business is not usurious, if the interest reserved does not exceed the legal rate."

See, also, *Union Savings Bank v. Dottenheim*, 107 Ga. 606, 614, 34 S. E. 217; *McCall v. Herring*, 116 Ga. 235, 243, 42 S. E. 468.

[2] Petitioner maintains the loans in question would have been usurious if made in Georgia by an individual or a state bank and that the same rule applies notwithstanding the lender happened to be a national bank. Respondent insists that the federal act permits it to discount short-time notes, reserving interest in advance at the maxi-

\*113

mum \*interest rate allowed by the state law—in this instance, 8 per centum.

In *Fleckner v. Bank*, 8 Wheat. 338, 349, 354 (5 L. Ed. 631) the charter of the Bank of the United States inhibited it from taking interest "more than at the rate of six per centum" and plaintiff claimed that by deducting interest at the rate of 6 per centum from the amount of a discounted note, the bank received usury. Replying to that point, this court, through Mr. Justice Story, said:



"If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts, generally, for the practice is believed to be universal; and probably few, if any, charters contain an express provision authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word 'discount' is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious."

See, also, *McCarthy v. First National Bank*, 223 U. S. 493, 499, 32 Sup. Ct. 240, 56 L. Ed. 523.

This view has been generally adopted. Many supporting cases are collected in a note to *Bank of Newport v. Cook*, 60 Ark. 288, 30 S. W. 35, 29 L. R. A. 761, 46 Am. St. Rep. 171, and in 39 *Cyclopedia of Law and Procedure*, 948 et seq.

"The taking of interest in advance, upon the discount of a note in the usual course of business by a banker, is not usury. This has long been settled, and is not now open for controversy." *Tyler on Usury* (1872) p. 155.

\*114

"That it is not usury to discount commercial paper in the ordinary course of business is absolutely settled. This rule of law arose out of custom and does not depend upon statute." *Webb on Usury* (1898) § 111.

Associations organized under the National Bank Act are plainly empowered to discount promissory notes in the ordinary course of business. To discount, *ex vi termini*, implies reservation of interest in advance; and, under the ancient and commonly accepted doctrine, when dealing with short-time paper such a reservation at the highest interest rate allowed by law is not usurious. Recognizing prevailing practice in business and the above stated doctrine concerning usury, we think Congress intended to endow national banks with the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest. To carry out this purpose, the National Bank Act provides that associations organized under it may reserve on any discount interest at the rate allowed by the state, and only when there is reservation at a rate greater than the one specified does the transaction become usurious.

The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from federal law.

The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.

Affirmed.

Mr. Justice PITNEY, with whom concurred Mr. Justice BRANDEIS and Mr. Justice CLARKE, dissenting.

I agree that in this case but one federal question is properly presented for our consideration, and that is whether the National

\*115

Bank of Savannah took usury, \*in violation of sections 5197 and 5198, Rev. Stat. U. S. when, in discounting short-term notes in the ordinary course of business at its banking house in the state of Georgia, it knowingly reserved in advance a discount at the rate of 8 per centum per annum, computed upon the face of such notes, when by the laws of Georgia this was not allowed to be done by state banks of issue.

I agree that this question is to be determined by the provisions of section 5197; but, so far as it depends upon ascertaining the local rate of interest, we must determine it according to the law of the state of Georgia, because the cited sections make that law the criterion. It is settled that although the consequences of acceptance of usurious interest by a national bank and the penalties to be enforced are to be determined by the provisions of the National Banking Act, the ascertainment of the rate of interest allowable is to be according to the state law. *Farmers', etc., National Bank v. Dearing*, 91 U. S. 29, 32, 23 L. Ed. 196; *Union National Bank v. Louisville, &c. Railway*, 163 U. S. 325, 331, 16 Sup. Ct. 1039, 41 L. Ed. 177; *Haseltine v. Central Bank of Springfield*, 183 U. S. 132, 134, 22 Sup. Ct. 50, 46 L. Ed. 118.

The language of section 5197 is explicit. It allows a national bank to—

"take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state. \* \* \* where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, \* \* \* the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. \* \* \*

\*116

"I regard it as clear that by 'the laws of the state' is meant not merely acts of legislation, much less a particular act or section, or a particular phrase in a single section. In order to determine the point in controversy we must take all applicable provisions of the statutes as interpreted and construed by the

decisions of the court of last resort, and from their combined effect determine what is "interest at the rate allowed by the laws of the state."

The pertinent statute law of the state of Georgia is found in sections 3426, 3427, and 3436 of the Code. The first of these defines "what is lawful interest," and prescribes 7 per centum per annum as the legal rate where no rate is named in the contract, and permits a higher rate to be specified in writing, "but in no event to exceed 8 per cent. per annum." Section 3427 defines usury as:

"Reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest."

And section 3436 declares:

"It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

I agree that, under the decisions of this court and the general current of authority, the discounting of short-term notes with a reservation of interest in advance at the highest rate allowed by statute is permissible, in the absence of special restriction. *Fleckner v. U. S. Bank*, 8 Wheat. 338, 349, 354, 5 L. Ed. 631.

And I understand it to have been permitted in Georgia prior to the recent decision by the Supreme Court of that state in *Loganville*

\*117

*Banking Co. v. Forrester*, 143 Ga. 302, 84 S. E. 961, L. R. A. 1915D, 1195. See *Mackenzie v. Flannery*, 90 Ga. 590, 599, 16 S. E. 710; *Union Savings Bank v. Dottenheim*, 107 Ga. 606, 614, 34 S. E. 217; *McCall v. Herring*, 116 Ga. 235, 243, 42 S. E. 468.

The *Forrester* Case was decided April 13, 1915. The claim involved in the present suit includes a series of transactions, the first of which was on November 2, 1914, the last on October 18, 1915. A majority of these were prior to the decision in the *Forrester* Case, and as to them I agree that there was no violation of the federal statute.

With respect to the others, I have reached a different conclusion. The case was decided on a demurrer to plaintiff's petition, in which it was alleged that defendant (now respondent) knowingly received and charged interest in excess of the highest contractual rate allowed under the laws of the state, specifying the particular dates and amounts. This necessarily imports a knowledge at the time of each transaction as to what then constituted the law of the state, supposing such knowledge need be averred.

As to these later transactions, with great

respect for the views of my Brethren, I am constrained to dissent from the opinion and judgment of the court because convinced that there is error in holding without qualification that since the decision of the *Forrester* Case 8 per cent. is the rate of interest allowed and limited for state banks of issue by the laws of the state of Georgia. It seems to me erroneous to regard that decision as merely defining usury and thus settling what lawfully may be done by state banks in respect of taking interest in advance, and to ignore its effect, in combination with the quoted sections of the Code, as constituting the law of the State which fixes the maximum rate of interest for such banks and therefore, under section 5197, Rev. Stat. U. S., establishes the limit for national banks located in that state. Plainly, I think, the purpose of Con-

\*118

gress was \*to place national banks upon a precise equality in this respect with banks of issue organized under state laws, and that where the local law places a higher or a lower limit upon such banks of issue than upon other lenders of money the same limit should be imposed upon the national banks.

The section has regard to substance, not merely to form; and in determining what is in substance the local rate of interest it is fallacious, I submit, to regard the multiplier only (say, 8 per cent.), and ignore the multiplicand, since both factors have equal influence in producing the result. As in other cases of testing state laws by a federal standard, the question is: What is the effect and operation of those laws, as construed and applied by the state court of last resort?

The difference between the effect of computing discount taken in advance according to the custom of bankers, by applying the allowed percentage to the face of the note, termed "bank discount," and the effect of deducting an amount equivalent to exact interest on the sum actually loaned, termed "true discount," is very substantial, and is recognized in the standard interest and discount tables, which contain computations on both bases. To illustrate by a comparison: If interest at the rate of 8 per centum per annum be reserved in advance and computed upon the face of a three months note, it amounts to 2.0408 per cent. for the period, or at the rate of 8.1632 per centum per annum upon the money loaned; upon a six months note it amounts to 4.1667 per cent. for the period, or at the rate of 8.3333 per centum per annum; upon a nine months note, to 6.383 per cent. for the period, or at the rate of 8.511 per centum per annum; upon a one year note it amounts to 8.695 per cent.

The legal problem is precisely analogous to that involved in comparing respective burdens of taxation imposed upon different prop-

\*119

erties or classes of property; \*concerning



which this court has more than once held that a law requiring that one class shall be taxed at the "same rate of taxation" paid by another requires that not only the percentage of the rate but the basis of the valuation shall be the same. *Cummings v. National Bank*, 101 U. S. 153, 158, 162-163, 25 L. Ed. 903; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

The laws of Georgia do not prohibit the taking of interest in advance by a state bank; and they permit it to be charged according to the usual course of banking, with this qualification, that if reserved in advance at the highest percentage, or at any percentage that has the effect of yielding to the lender more than at the rate of 8 per centum per annum upon the amount actually loaned, it is usurious. This qualification, which since the decision of the *Forrester Case* must be deemed to be the law of Georgia, has precisely the same effect as if it had been inserted by way of an amending proviso to sec. 3426 of the Code. That it happens to arise from the construction and application of that section together with sections 3427 and 3436 by the state court of last resort can make no difference for present purposes.

The case before us comes squarely within the principle of *Citizens' National Bank v. Donnell*, 195 U. S. 369, 373-374, 25 Sup. Ct. 49, 49 L. Ed. 238. There the question was whether a national bank in Missouri had taken usury, contrary to sections 5197 and 5198, Rev. Stat. U. S., in taking interest computed at a percentage less than the highest rate allowed by the state law, if agreed upon in writing, but at the same time violating a state prohibition against compounding interest oftener than once a year. This court held that the prohibition against frequent compounding affected the "rate of interest" within the meaning of those words in section 5198, and that this section was violated because the local prohibition was violated. I quote from the opinion (195 U. S. 374, 25 Sup. Ct. 50, 49 L. Ed. 238):

"The rate of interest which a man receives

\*120

is greater when \*he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point, and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union National Bank v. Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331 [16 Sup. Ct. 1039, 41 L. Ed. 177]. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year it was at a rate

greater than was allowed by Rev. Stat. U. S. § 5197, and it was forfeited."

For these reasons I am convinced that the respondent national bank, in knowingly discounting notes and reserving interest at the rate of 8 per centum per annum upon the face of the notes, in violation of the limitation imposed by the quoted sections of the Georgia Code as construed by the Supreme Court of that state in the *Forrester Case*, charged more than "interest at the rate allowed by the laws of the state," and that therefore the judgment in its favor ought to be reversed.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this dissent.

(251 U. S. 57)

BRAGG v. WEAVER et al.

(Argued Oct. 13, 1919. Decided Dec. 8, 1919.)

No. 22.

1. CONSTITUTIONAL LAW ⇨281—HEARING ON NECESSITY AND EXPEDIENCY OF CONDEMNATION NOT ESSENTIAL TO DUE PROCESS.

Where the intended use of property is public, the necessity and expediency of its taking may be determined by such agency and in such mode as the state may designate, being legislative questions, no matter who may be charged with their decision, and a hearing thereon not being essential to due process in the sense of the Fourteenth Amendment to the federal Constitution.

2. CONSTITUTIONAL LAW ⇨281—HEARING ON QUESTION OF COMPENSATION FOR CONDEMNATION OF PROPERTY ESSENTIAL TO DUE PROCESS.

It is essential to due process in the sense of the Fourteenth Amendment to the federal Constitution that the mode of determining the compensation for private property taken for public use be such as to afford the owner an opportunity to be heard, among several permissible modes being that of causing the amount to be assessed by viewers subject to appeal to a court carrying with it a right to have the matter determined on full trial; in such case due process not requiring that hearing be afforded before the viewers, but being satisfied by the hearing obtainable on appeal.

3. EMINENT DOMAIN ⇨167(1)—MODE OF DETERMINING COMPENSATION FOR EARTH TAKEN TO REPAIR ROAD.

By Code Va. 1904, § 944a, cls. 21, 22, the compensation to an owner of land adjoining a public road for earth taken for use in repairing the road is to be assessed primarily by viewers, whose award is to be examined by the supervisors of the county and approved or changed as to the latter may appear reasonable, while from the decision of the supervisors an appeal lies as of right to the circuit court, where the matter may be heard de novo.



4. CONSTITUTIONAL LAW ⇨281—PROVISIONS AS TO TAKING OF EARTH FOR ROAD NOT A DENIAL OF DUE PROCESS.

In view of Code Va. 1904, § 838, regulating the time and mode of taking appeals from decisions of county supervisors, section 944a, cls. 5, 21, 22, providing the mode of compensation for earth taken from land for use in repairing an adjacent public road, *held* not violative of the due process clause of Const. U. S. Amend. 14, as making no provision for hearing of the owner on the compensation to be paid; the proceedings, even when initiated by road officers, not being terminable without any notice to the owner.

5. CONSTITUTIONAL LAW ⇨280 — EMINENT DOMAIN ⇨70—TAKING BEFORE ASCERTAINMENT OF COMPENSATION NOT DENIAL OF DUE PROCESS.

Where adequate provision is made for the certain payment of compensation without unreasonable delay for property taken, the taking does not contravene due process of law in the sense of the Fourteenth Amendment to the federal Constitution merely because it precedes the ascertainment of what compensation is just.

In Error to the Supreme Court of Appeals of the State of Virginia.

Suit by Talbot Darby Bragg against R. S. Weaver and others. From judgment for defendants, plaintiff appealed to the Supreme Court of Appeals of Virginia, which affirmed, and plaintiff brings error. Judgment affirmed.

Messrs. George E. Allen, of Victoria, Va., and John Garland Pollard, of Richmond, Va., for plaintiff in error.

Mr. J. D. Hank, Jr., of Richmond, Va., for defendants in error.

\*58

\*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the state (Pollard's Code, 1904, § 944a, clauses 21 and 22).<sup>1</sup> Whether the statute denies to the owner the due process of law guaranteed by the Fourteenth Amendment is the federal question in the case. It was duly presented in the state court and, while no opinion was delivered, the record makes it plain that by the judgment rendered the court resolved the question in favor of the validity of the statute.

It is conceded that the taking is under the

direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

[1] Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed.

\*59

206; *\*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853; *Adirondack Ry. Co. v. New York*, 176 U. S. 335, 349, 20 Sup. Ct. 460, 44 L. Ed. 492; *Sears v. City of Akron*, 246 U. S. 242, 251, 38 Sup. Ct. 245, 62 L. Ed. 688.

[2] But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Backus v. Fort Street Union Depot Co.*, *supra*, 169 U. S. p. 569, 18 Sup. Ct. 445, 42 L. Ed. 853. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. *Lent v. Tillson*, 140 U. S. 316, 326, *et seq.* 11 Sup. Ct. 825, 35 L. Ed. 419; *Winnona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 537, 16 Sup. Ct. 83, 40 L. Ed. 247; *Wells Fargo & Co. v. Nevada*, 248 U. S. 165, 168, 39 Sup. Ct. 62, 63 L. Ed. 190. And see *Capital Traction Co. v. Hof*, 174 U. S. 1, 18-30, 45, 19 Sup. Ct. 580, 43 L. Ed. 873.

[3, 4] With these principles in mind we turn to the statute in question. By clause 21 it authorizes certain officers engaged in repairing public roads to take earth for that purpose from adjacent lands, and by clause 22 it declares:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said free-

<sup>1</sup> Other enactments of March 12, 1912, c. 151; March 21, 1914, c. 174, and March 17, 1916, c. 279, make the statute specially applicable here, but they require no particular attention.

holders, after being sworn according to the provisions of section three of this act,<sup>\*60</sup> shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

The same statute, in clause 5, deals with the compensation to be paid for lands taken for roadways, and in that connection provides that the proprietor or tenant, if dissatisfied with the amount allowed by the supervisors, "may of right appeal to the circuit court of said county, and the said court shall hear the matter *de novo*" and determine and certify the amount to be paid. And a general statute (section 838), which regulates the time and mode of taking appeals from decisions of the supervisors disallowing claims in whole or in part, provides that the claimant, if present when the decision is made, may appeal to the circuit court within thirty days thereafter, and, if not present, shall be notified in writing by the clerk and may appeal within thirty days after service of the notice.

Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so for the purposes of this case we must construe them. The task is not difficult. The words employed are direct and free from ambiguity, and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers, that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal lies as of right to the circuit court where the matter may be heard *de novo*. Thus, by exercising the right to appeal the owner may obtain a full hearing in a court of justice—one concededly possessing and exercising a general jurisdiction. An opportunity to have

such a <sup>\*61</sup>hearing, before the compensation is finally determined, and when the right there-to can be effectively asserted and protected, satisfies the demand of due process.

Under the statute the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the initiative—as they do in many instances—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore with-

out his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22 taken together provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision, and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when section 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the Legislature provides otherwise. Here the Legislature has not provided otherwise, and so has indicated that it is content to have the general

<sup>\*62</sup>statute applied. As before stated, that <sup>\*</sup>statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begins to run at once. It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the circuit court.

[5] The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet v. Rechel*, 159 U. S. 380, 402, 16 Sup. Ct. 43, 40 L. Ed. 188; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853; *Williams v. Parker*, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559; *Crozler v. Krupp*, 224 U. S. 290, 306, 32 Sup. Ct. 488, 56 L. Ed. 771. And see *Branson v. Gee*, 25 Or. 462, 36 Pac. 527, 24 L. R. A. 355. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

<sup>1</sup> " \* \* \* That they will faithfully and impartially discharge their duty as viewers."



We conclude that the objections urged against the validity of the statute are not well taken.

Judgment affirmed.

(251 U. S. 121)

PETERS et al. v. VEASEY.

(Argued Nov. 14, 1919. Decided Dec. 8, 1919.)

No. 77.

1. ADMIRALTY  20—STATE COMPENSATION LAWS INAPPLICABLE TO MARITIME TORT.

The work in which a longshoreman on board a vessel lying at New Orleans was engaged having been maritime in its nature, his employment was a maritime contract, his injuries were maritime, and the rights and liabilities of himself and his employers were within the admiralty jurisdiction of the United States, so that the Workmen's Compensation Law of Louisiana had no application.

2. ADMIRALTY  20—STATUTE SAVING REMEDIES UNDER WORKMEN'S COMPENSATION LAWS WITHOUT RETROACTIVE EFFECT.

Act Cong. Oct. 6, 1917, c. 97, amending Judicial Code, § 24, cl. 3, and section 256, cl. 3 (Comp. St. 1918, §§ 991, 1233), so as to save to claimants for injuries otherwise within the federal admiralty jurisdiction their rights and remedies under the Workmen's Compensation Law of any state, should not be given a retroactive effect; there being nothing to indicate such a purpose.

Mr. Justice Brandeis and Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Louisiana.

Suit under the Workmen's Compensation Act of Louisiana by Thomas Veasey against Henry Peters, Eugene Peters, and the Aetna Life Insurance Company. Judgment for plaintiff, and defendants appealed to the Supreme Court of Louisiana, which affirmed (142 La. 1012, 77 South. 948), and, plaintiff having died, and the administratrix of his succession having been substituted, defendants bring error. Judgment of the Supreme Court of Louisiana reversed, and cause remanded for further proceedings.

Messrs. George Janvier and William C. Dufour, both of New Orleans, La., for plaintiffs in error.

Mr. Walter S. Penfield, of Washington, D. C., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

In a proceeding under the Workmen's Compensation Law of Louisiana (No. 20, Acts La. 1914), the Supreme Court of that state affirmed a judgment against plaintiffs in error and in favor of Veasey, who claimed to have suffered injuries, August 6, 1915, while

employed by Henry \*and Eugene Peters as a longshoreman on board the *Seria*, then lying at New Orleans. The steamer was being unloaded. While upon her and engaged in that work, Veasey accidentally fell through a hatchway. *Veasey v. Peters*, 142 La. 1012, 77 South. 948.

A compensation policy in favor of Peters, issued by the Aetna Life Insurance Company, was in force when the accident occurred.

[1] The work in which defendant in error was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. In such circumstances, the Workmen's Compensation Law of the state had no application when the accident occurred. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, 218, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

[2] Clause third, section 24, of the judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091) confers upon the District Courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Clause third, section 256, provides that the jurisdiction of the courts of the United States shall be exclusive in "all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." By an act approved October 6, 1917 (40 Stat. 395, c. 97 [Comp. St. 1918, §§ 991, 1233]), Congress directed that both of these clauses be amended by inserting after "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The court below erroneously concluded that this act should be given retroactive effect and applied in the

\*123  
\*present controversy. There is nothing in the language employed, nor is there any circumstance known to us, which indicates a purpose to make the act applicable when the cause of action arose before its passage; and we think it must not be so construed.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice BRANDEIS and Mr. Justice CLARKE dissent.



(251 U. S. 48)  
**LIVERPOOL, BRAZIL & RIVER PLATE  
 STEAM NAV. CO. v. BROOKLYN EAST-  
 ERN DISTRICT TERMINAL.**

(Argued Nov. 14, 1919. Decided Dec. 8, 1919.)

No. 81.

**COLLISION** ⚓25—LIMIT OF RESPONSIBILITY  
 OF OWNER OF TUG.

Under Rev. St. §§ 4283-4285 (Comp. St. §§ 8023-8025), providing that liability of owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel, responsibility of owner of tug, the moving cause of collision with a vessel, is not increased by the fact that a loaded car float and a disabled boat, both belonging to the tug's owner, were lashed to its sides, and that one of them was the object that came in contact with the injured vessel.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel by the Liverpool, Brazil & River Plate Steam Navigation Company against the Brooklyn Eastern District Terminal. Decree limiting respondent's liability was affirmed by the Circuit Court of Appeals (250 Fed. 1021, 162 C. C. A. 664), and the Navigation Company brings certiorari. Affirmed.

Messrs. Van Vechten Veeder and Roscoe H. Hupper, both of New York City, for petitioner.

Messrs. Samuel Park and Henry E. Mattison, both of New York City, for respondent.

\*51

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a libel in admiralty brought by the petitioner against the respondent for a collision with the petitioner's steamship Vauban while it was moored at a pier in Brooklyn. The respondent does not deny liability but claims the right to limit it under Rev. Stats. §§ 4283, 4284 and 4285 (Comp. St. §§ 8023-8025), to the value of the vessel that caused the damage. The moving cause was the respondent's steam tug Intrepid which was proceeding up the East River, with a car flat loaded with railroad cars lashed to its port side and on its starboard side a dis-

\*52

abled tug, both belonging to the \*respondent. By a stipulation dated August 3, 1917, it was agreed that the damage sustained was \$28,036.98 with \$5,539.84 interest. The value of the tug Intrepid was found to be \$5,750, and the liability of the respondent was limited by the District Court to that sum with interest. The Circuit Court of Appeals affirmed the decree without an opinion. 250 Fed. 1021, 162 C. C. A. 664. The case is brought here on the question whether the value of the whole flotilla should not have been included in the decree.

The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid that fact does not affect the question of responsibility. The *James Gray v. The John Fraser*, 21 How. 184, 16 L. Ed. 106; The *J. P. Donaldson*, 167 U. S. 599, 603, 604, 17 Sup. Ct. 951, 42 L. Ed. 292; The *Eugene F. Moran*, 212 U. S. 466, 474, 475, 29 Sup. Ct. 339, 53 L. Ed. 600; *Union Steamship Co. v. Owners of the Aracan*, L. R. 6 P. C. 127. The rule is not changed by the ownership of the vessels. The *John G. Stevens*, 170 U. S. 113, 123, 18 Sup. Ct. 544, 42 L. Ed. 969; The *W. G. Mason*, 142 Fed. 913, 917, 74 C. C. A. 83; The *Eugene F. Moran*, 212 U. S. 466, 475, 29 Sup. Ct. 339, 53 L. Ed. 600; L. R. 6 P. C. 127, 133. These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid and so were more helplessly under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability the foregoing authorities are not controlling—that the object of the statute is “to limit the liability of vessel owners to their interest in the *adventure*,” The *Main v. Williams*, 152 U. S. 122, 131, 14 Sup. Ct. 486, 488 (38 L. Ed. 381), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for

\*53

which it \*was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that if sound it applies a different rule in actions in personam from that which as we have said, governs suits in rem. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the appellant contends.

The statute follows the lead of European countries, as stated in The *Main v. Williams*, 152 U. S. 122, 126, 127, 14 Sup. Ct. 486, 38 L. Ed. 381. Whatever may be the doubts as to the original grounds for limiting liability to the ship or with regard to the historic starting point for holding the ship responsible as a moving cause, The *Blackheath*, 195 U. S. 361, 366, 367, 25 Sup. Ct. 46, 49 L. Ed. 236, it seems a permissible conjecture that both principles, if not rooted in the same conscious thought, at least were influenced by the same semi-conscious attitude of mind. When the continental law came to be followed by Congress, no doubt, alongside of the de-

sire to give our shipowners a chance to compete with those of Europe, there was in some sense as intent to limit liability to the venture, but such a statement gives little help in deciding where the line of limitation should be drawn. No one, we presume, would contend that other unattached vessels, belonging if you like to the same owner, and co-operating to the same result with the one in fault, would have to be surrendered. *Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209, 212-214, 124 C. C. A. 479; *The Sunbeam*, 195 Fed. 468, 470, 115 C. C. A. 370; *The W. G. Mason*, 142 Fed. 913, 919, 74 C. C. A. 83. The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." *Fitz. Abr.*, Barre, 290. The

\*54

words of the \*statute are:

"The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel."

The literal meaning of the sentence is reinforced by the words "in no case." For clearly the liability would be made to exceed the interest of the owner "in such vessel" if you said frankly, In some cases we propose to count other vessels in although they are not "such vessel"; and it comes to the same thing when you profess a formal compliance with the words but reach the result by artificially construing "such vessel" to include other vessels if only they are tied to it. Earlier cases in the Second Circuit had disposed of the question there, and those in other circuits for the most part if not wholly are reconcilable with them. We are of opinion that the decision was right. *The Transfer No. 21*, 248 Fed. 459, 160 C. C. A. 469; *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83; *The Erie Lighter 108* (D. C.) 250 Fed. 490, 497, 498; *Van Eyken v. Erie R. Co.* (D. C.) 117 Fed. 712, 717.

Decree affirmed.

(251 U. S. 123)

NEW YORK, N. H. & H. R. CO. v. UNITED STATES.

(Argued May 2, 1919. Decided Dec. 8, 1919.)

No. 74.

1. POST OFFICE  21(4)—TIME FOR WEIGHING MAIL TO DETERMINE COMPENSATION DUE RAILROAD.

Payments by the United States to a mail-carrying railroad pursuant to Rev. St. § 4002 (Comp. St. § 7483), during each four-year term, on the basis of weight taken immediately prior

to the beginning of the term, instead of annually, accords with prior practice, is permitted by the letter of the statute, and impliedly has been sanctioned by the Supreme Court.

2. POST OFFICE  21(4)—IMPLIED CONTRACT FOR COMPENSATION OF RAILROAD VOLUNTARILY CARRYING MAILS.

Prior to Act July 28, 1916, with the exception of certain roads aided by land grants, railroads were not required by law to carry the mails, and a road which voluntarily accepted and performed the service with knowledge of what the United States intended to pay under Rev. St. § 4002 (Comp. St. § 7483), as amended, cannot later claim an implied contract for a greater sum; the possibility that by failing to carry the road would incur the hostility of those along its lines not amounting to compulsion by the United States, forming the basis of a justiciable claim against them for taking property.

Mr. Justice Brandeis dissenting.

Appeal from the Court of Claims.

Suit by the New York, New Haven & Hartford Company against the United States. From a judgment dismissing the petition on demurrer (53 Ct. Cl. 222), petitioner appeals. Affirmed.

Messrs. Edward G. Buckland, of New Haven, Conn., and S. S. Ashbaugh, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Brown, for the United States.

\*126

\*Mr. Justice McKEYNOLDS delivered the opinion of the Court.

Appellant sued the United States to recover the difference between amounts received through the Post Office Department and what it claims should have been paid for its services in carrying the mails during a series of years, ending June 30, 1914. The demand is based upon implied contracts alleged to arise from the following circumstances: First, Acceptance and transportation of the mails in reliance upon section 4002, Revised Statutes (Comp. St. § 7483), as amended. This directs payment of specified sums per mile per annum according to weights; and the claim is that because the Post Office Department improperly construed and applied it, appellant received much less than it should have. Second, Acceptance and transportation of the mails under orders and coercion of the Post Office Department, followed by failure to allow reasonable compensation therefor. Appellant claims its property was taken for public use and adequate compensation must be paid.

[1] Concerning the challenged interpretation and application of section 4002, Revised Statutes, resulting in payments during each four-year term upon the basis of weights

\*127

taken \*immediately prior to the beginning of the same, instead of annually, it suffices to



say that the action taken accords with prior practice followed for many years, the letter of the statute permits it, the carrier submitted with full knowledge, and, impliedly at least, it was sanctioned by this court in *Delaware, L. & W. R. R. Co. v. United States*, 249 U. S. 385, 39 Sup. Ct. 348, 63 L. Ed. 659.

[2] We think it must be treated as settled doctrine that prior to Act July 28, 1916, c. 261, 39 Stat. 412, 429—with the exception of certain roads aided by land grants—railroads were not required by law to carry the mails. *Eastern R. R. Co. v. United States*, 129 U. S. 391, 394, 9 Sup. Ct. 320, 32 L. Ed. 730; *Atchison, T. & S. F. Ry. Co. v. United States*, 225 U. S. 640, 650, 32 Sup. Ct. 702, 56 L. Ed. 1236. *Delaware, L. & W. R. R. Co. v. United States*, supra. And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot now claim an implied contract for a greater sum. It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and cannot constitute the basis of a justiciable claim against them for taking property.

The Court of Claims (53 Ct. Cl. 222) dismissed the petition upon demurrer, and its judgment is

Affirmed.

Mr. Justice BRANDEIS dissents.

(251 U. S. 54)

CHICAGO, R. I. & P. R. CO. v. COLE.

(Submitted on Motion to Dismiss or Affirm  
Nov. 17, 1919. Decided Dec.  
8, 1919.)

No. 290.

1. CONSTITUTIONAL LAW ⇐305—NO VESTED RIGHT TO DEFENSE OF CONTRIBUTORY NEGLIGENCE OF PERSON ON TRACK.

A railroad company, which ran over and killed plaintiff's intestate standing on its track, had no vested right to the defense of contributory negligence.

2. JURY ⇐11(5)—FEDERAL CONSTITUTION NO LIMITATION ON STATE AS TO RIGHTS TO JURY TRIAL.

A state is not compelled by the federal Constitution or its amendments to maintain the familiar line between the functions of the jury and those of the court, but may do away with the jury altogether, modify its Constitution or the requirements of a verdict, or the procedure before the jury, and may confer larger powers on the jury than those generally prevailing.

3. CONSTITUTIONAL LAW ⇐305—CONSTITUTIONALITY OF PROVISION MAKING NEGLIGENCE OF DECEDENT A JURY QUESTION.

Const. Okl. art. 23, § 6, providing that the defense of contributory negligence or assumption of risk shall in all cases be a question of fact, and at all times left to the jury, held not violative of Const. U. S. Amend. 14, in its application to a railroad whose train killed plaintiff's decedent when he stepped on its track as a train was approaching in full view; the railroad not being entitled to complain that its chance to prevail on a certain ground was diminished, when the ground might have been altogether removed.

In Error to the Supreme Court of the State of Oklahoma.

Action by Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself and others, against the Chicago, Rock Island & Pacific Railway Company. To review a judgment for plaintiff, defendant brought error to the Supreme Court of Oklahoma, which affirmed, and defendant brings error. Judgment affirmed.

Messrs. R. J. Roberts, of El Reno, Okl., and Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., for plaintiff in error.

Messrs. W. A. Ledbetter, of Oklahoma City, Okl., and H. L. Stuart, of Gainesville, Tex., for defendant in error.

\*55

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought by the defendant in error for knocking down and killing her intestate, Roberts. He stepped upon the railroad track when a train was approaching in full view and was killed. It may be assumed, as the State court assumed, that, if the question were open for a ruling of law, it would be ruled that the plaintiff could not recover. But the Oklahoma Constitution provides that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." Article 23, § 6. The case was left to the jury and they found a verdict for the plaintiff. Judgment was entered for her and was affirmed on error by the Supreme Court of the State, which held that the provision applied to the case and that when so applied it did not contravene the Fourteenth Amendment of the Constitution of the United States.

[1-3] The State Constitution was in force when the death occurred and therefore the defendant had only such right to the defense of contributory negligence as that Constitution allowed. The argument that the Railroad Company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether. *Arizona Em-*



(40 Sup.Ct.)

players' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058; Bowersock v. Smith, 243 U. S. 29, 34, 37 Sup. Ct. 371, 61 L. Ed. 572. It is said that legislation cannot

\*56

\*change the standard of conduct, which is matter of law in its nature into matter of fact, and this may be conceded; but the material element in the constitutional enactment is not that it called contributory negligence fact but that it left it wholly to the jury. There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; modify its constitution, *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; the requirements of a verdict, *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505; or the procedure before it, *Twining v. New Jersey*, 211 U. S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; *Frank v. Mangum*, 237 U. S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commission not known to the common law, *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in *Sparf v. United States*, 156 U. S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed.

Judgment affirmed.

(251 U. S. 27)

POSTAL TELEGRAPH-CABLE CO. v.  
WARREN-GODWIN LUMBER  
CO.

(Argued and Submitted Nov. 17, 1919. Decided Dec. 8, 1919.)

No. 91.

COMMERCE §8(7)—FEDERAL REGULATION OF TELEGRAPH LINES EXCLUDES STATE LAWS AS TO LIMITING LIABILITY.

Act Cong. June 18, 1910, was an assertion by Congress of its authority to bring under federal control the interstate business of telegraph companies, and therefore was an occu-

pation of the field by Congress, which excluded state action and rendered valid a telegraph company's contract limiting to a refund of the price for transmission any liability on account of an unrepeatd message, despite the state's prohibition of a contract against liability for negligence.

On Writ of Certiorari to the Supreme Court of the State of Mississippi.

Action by the Warren-Godwin Lumber Company against the Postal Telegraph-Cable Company. From a judgment for defendant, plaintiff appealed to the Supreme Court of Mississippi, which reversed, and entered judgment for plaintiff (116 Miss. 660, 77 South. 601), and defendant brings certiorari. Judgment of the Supreme Court of Mississippi reversed, and cause remanded for further proceedings.

Messrs. Ellis B. Cooper and J. N. Flowers, both of Jackson, Miss., for petitioner.

Mr. Wm. D. Anderson, of Tupelo, Miss., for respondent.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was

\*28

not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In *Western Union Telegraph Company v. Showers*, 112 Miss. 411, 73 South. 276, the Supreme Court of that state was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeatd message essentially like the contract which was considered and upheld in the *Primrose* Case. The court decided that as the Act of Congress of June 18, 1910, c. 309, 36 Stat. 539, 545, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress had taken possession of the field and thus excluded state legislation and hence such a contract was valid and enforceable in accord-

ance with the rule laid down in the Primrose Case. In holding this, however, the court pointed out that but for the act of Congress a different rule would apply, as under the state law such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In *Dickerson v. Western Union Telegraph Company*, 114 Miss. 115, 74 South. 779, the validity of a like contract by a telegraph company for the sending of an unrepeatable message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the *Showers Case*, as to the operation of the act of Congress of 1910, was erroneous. Coming therefore anew to reconsider that subject, it was held that the act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business and the contracts made by them as to such

\*29

subject, and hence the *Showers Case*, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us involving the extent of the liability of the Telegraph Company for an unrepeatable interstate message governed by a contract like those considered in the previous cases, was decided by a state circuit court after the decision in the *Showers Case* and before the overruling of that case by the *Dickerson Case*. Presumably therefore the court, because of the *Showers* decision upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the *Dickerson Case*. In view of that situation the court below in disposing of the case expressly declared that the only issue which was open was the correctness of the ruling in the *Dickerson Case*, limiting the operation and effect of the act of Congress of June 18, 1910. Disposing of that issue, the ruling in the *Dickerson Case* was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law and to be therefore void. That subject, presents then, the only federal question, and indeed the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the *Dickerson Case* as to the correctness of its ruling in the *Showers Case* (*Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Western Union Telegraph Company v. Crovo*, 220 U. S. 346, 31 Sup. Ct. 399, 55 L. Ed. 498; *Adams Express Company v. Croninger*, 226

U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Western Union Telegraph Company v. Brown*, 234 U. S. 542, 34

\*30

Sup. Ct. 955, 58 L. Ed. 1457), but content ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the act of Congress of 1910 and why therefore its judgment was erroneous.

In the first place, as it is apparent on the face of the act of 1910 that it was intended to control telegraph companies by the act to regulate commerce, we think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeatable telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since as pointed out in the *Primrose Case* the right to contract on such subject was embraced within the grant of the primary rate-making power.

In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeatable, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal

\*31

\*control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (*Clay County Produce Company v. Western Union Telegraph Company*, 44 Interst. Com. R. 670), from the very inception of the telegraph business, or at least for a period of 40 years before 1910, the unrepeatable message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Com



mission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardiner v. Western Union Telegraph Company*, 231 Fed. 405, 145 C. C. A. 399); and by the numerous and conclusive opinions of state courts of last resort which in considering the act of 1910 from various points of view reached the conclusion that that act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action (*Western Union Tel. Co. v. Bank of Spencer*, 53 Okl. 398, 156 Pac. 1175; *Haskell Implement Co. v. Postal Tel.-Cable Co.*, 114 Me. 277, 96 Atl. 219; *Western Union Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91; *Bailey v. Western Union Tel. Co.*, 97 Kan. 619, 156 Pac. 716; *Durre v. Western Union Tel. Co.*, 165 Wis. 190, 161 N. W. 755; *Western Union Tel. Co. v. Schade*, 137 Tenn. 214, 192 S. W. 924; *Meadows v. Postal Tel.-Cable Co.*, 173 N. C. 240, 91 S. E. 1009; *Norris v. Western Union Tel. Co.*, 174 N. C. 92, 93 S. E. 465; *Bateman v. Western Union Tel. Co.*, 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A, 803; *Western Union Tel. Co. v. Lee*,

\*32

174 \*Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026; *Western Union Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192; *Western Union Tel. Co. v. Hawkins*, 14 Ala. App. 295, 70 South. 12).

It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred.

It follows that the judgment below was erroneous, and it must be reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

And it is so ordered.

Mr. Justice PITNEY dissents.

(251 U. S. 63)

ST. LOUIS, I. M. & S. RY. CO. v. WILLIAMS et al.

(Argued Nov. 11, 1919. Decided Dec. 8, 1919.)  
No. 66.

1. CONSTITUTIONAL LAW §303—IMPOSITION OF PENALTY ON CARRIER TO ENFORCE RATE AS VIOLATION OF DUE PROCESS.

The imposition of severe penalties upon a common carrier as a means of enforcing a prescribed rate is in contravention of due process

of law, where no adequate opportunity is afforded the carrier to test safely, in an appropriate judicial proceeding, the validity of the rate—that is, to determine whether it is confiscatory or otherwise—before any liability for the penalties attaches.

2. CONSTITUTIONAL LAW §303—ENFORCEMENT OF RATE FOR CARRIER BY PENALTIES NOT A DENIAL OF DUE PROCESS.

Where a common carrier is afforded opportunity to test the validity of a prescribed rate in an appropriate judicial proceeding before any liability for penalties attaches, and the rate is adjudged valid, or the carrier fails to avail itself of the opportunity, it is permissible for the state, so far as due process is concerned, to enforce adherence to the rate by imposing substantial penalties for deviation.

3. EVIDENCE §20(2)—JUDICIAL NOTICE OF METHOD FOR CARRIER TO SECURE RELIEF FROM CONFISCATORY RATE.

The Supreme Court has judicial knowledge that, if a common carrier really regarded as confiscatory a rate prescribed by the state, the way was open to it to secure determination of the question by a suit in equity against the Railroad Commission of the state, during pendency of which operation of the penalty provision of the rate statute could have been suspended by injunction.

4. CARRIERS §20(4)—PENAL CHARACTER OF RATE ENFORCEMENT STATUTE.

A state statute subjecting a common carrier, for every offense of demanding or collecting a greater rate than prescribed, to a penalty of not less than \$50 nor more than \$300 and costs, is essentially penal in such provision, though the penalty goes to the aggrieved passenger, and is to be enforced by private suit, being intended primarily to punish the carrier for taking more than the prescribed rate.

5. CONSTITUTIONAL LAW §303—RECOVERY OF PENALTY BY PASSENGER FROM RATE BREAKING CARRIER.

It is not contrary to due process of law that a state statute, intended to enforce adherence to prescribed rates by common carriers, provides that a penalty recoverable by private suit shall go to the aggrieved passenger, and not the state.

6. CONSTITUTIONAL LAW §303—PENALTY FOR RATE BREAKING BY CARRIER NOT CONTRARY TO DUE PROCESS.

To avoid violation of the constitutional requirement of due process, it is not necessary that a state statute, giving an aggrieved passenger the right to recover by private suit a penalty from a carrier which has not adhered to a prescribed rate, should confine or proportion the penalty to the passenger's loss or damages. It being imposed as punishment for a violation of public law, the Legislature may adjust its amount to the public wrong rather than the private injury.

7. CONSTITUTIONAL LAW §303—PENALTY FOR VIOLATION OF STATE STATUTE CONSTITUTING DENIAL OF DUE PROCESS.

Though the Fourteenth Amendment of the federal Constitution in its due process of law clause limits the power of the states to pre-



scribe penalties for violations of their laws, the states still possess a wide latitude of discretion, and their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense, and obviously unreasonable.

8. CARRIERS —2— CONSTITUTIONAL LAW —303— PENALTY PROVISION FOR RATE ENFORCEMENT NOT CONTRARY TO DUE PROCESS.

Laws Ark. 1887, p. 227 (Kirby's Dig. 1904, § 6620), and Laws 1915, p. 365 (Kirby & Castle's Dig. 1916, § 8094), subjecting any railroad company, for every offense of demanding or collecting a greater compensation than prescribed for the transportation of passengers, to a penalty of not less than \$50 nor more than \$300 and costs of suit, recoverable by the aggrieved passenger, held not violative of the due process clause of the Fourteenth Amendment to the federal Constitution; the penalty not being so severe and oppressive as to be unreasonable.

Mr. Justice McReynolds dissents.

In Error to the Supreme Court of the State of Arkansas.

Consolidated actions by Dicksey Williams and Lucy Williams against the St. Louis, Iron Mountain & Southern Railway Company. From judgments for plaintiffs, defendant appealed to the Supreme Court of Arkansas, which affirmed (131 Ark. 442, 199 S. W. 376), and defendant brings error. Affirmed.

Messrs. Robert E. Wiley and Edgar B. Kinsworthy, both of Little Rock, Ark., for plaintiff in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

By a statute of Arkansas, regulating rates for the transportation of passengers between

\*64  
points within the state, "any railroad company that demands or collects a greater compensation than the statute prescribes is subjected "for every such offense" to a penalty of "not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee," and the aggrieved passenger is given a right to recover the same in a civil action. Act April 4, 1887 (Laws 1887, p. 227; Kirby's Digest, 1904, § 6620); Act March 4, 1915 (Laws 1915, p. 365; Kirby & Castle's Digest, 1916, § 8094).

In June, 1915, a company operating a line of railroad within the state demanded and collected 66 cents more than the prescribed fare from each of two sisters carried over part of its line when returning to their home from a school commencement elsewhere in the state; and in suits separately brought for the purpose, and afterwards consolidated, these passengers obtained judgments against the company for the overcharge, a penalty of seventy-five dollars and costs of suit, including an attorney's fee of twenty-five dollars. The company appealed, asserting that the

provision for the penalty was repugnant to the due process of law clause of the Fourteenth Amendment; but the Supreme Court of the state sustained the provision and affirmed the judgments. 131 Ark. 442, 199 S. W. 376. To obtain a review of that decision the company prosecutes this writ of error.

The grounds upon which the provision is said to contravene due process of law are, first, that the penalty is "so severe as to deprive the carrier of the right to resort to the courts to test the validity" of the rate prescribed, and, second, that the penalty is "arbitrary and unreasonable, and not proportionate to the actual damages sustained."

[1] It is true that the imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial

\*65  
proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches. The reasons why this is so are set forth fully and plainly in several recent decisions and need not be repeated now. *Ex parte Young*, 209 U. S. 123, 147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 207, 208, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 659, et seq., 35 Sup. Ct. 214, 59 L. Ed. 405.

[2] And it also is true that where such an opportunity is afforded and the rate is adjudged valid, or the carrier fails to avail itself of the opportunity, it then is admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate by imposing substantial penalties for deviations from it. *Wadley Southern Ry. Co. v. Georgia*, supra, 235 U. S. p. 667 et seq., 35 Sup. Ct. 214, 59 L. Ed. 405; *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 246 U. S. 58, 62, 38 Sup. Ct. 236, 62 L. Ed. 574.

[3] Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the state, during the pendency of which the operation of the penalty provision could have been suspended by injunction. *Wadley Southern Ry. Co. v. Geor-*

gia, supra. See, also, *Allen v. St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625; *Rowland v. St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. Ed. 1022; *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200. And the record shows that at the trial the carrier not only did not raise any question about the correct fare, but proposed and secured an instruction to the jury wherein the prescribed rate was recognized as controlling.

\*66

\*[4-6] It therefore is plain that the first branch of the company's contention cannot prevail.

The second branch is more strongly urged, and we now turn to it. The provision assailed is essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate. *Railway Co. v. Gill*, 54 Ark. 101, 106, 15 S. W. 18, 11 L. R. A. 452; *St. Louis, Iron Mountain & Southern Ry. Co. v. Waldrop*, 93 Ark. 42, 45, 123 S. W. 778. True, the penalty goes to the aggrieved passenger and not the state, and is to be enforced by a private and not a public suit. But this is not contrary to due process of law; for, as is said in *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 523, 6 Sup. Ct. 110, 114 (29 L. Ed. 463), "the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion." Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state. See *Marvin v. Trout*, 199 U. S. 212, 225, 26 Sup. Ct. 31, 50 L. Ed. 157.

The ultimate question is whether a penalty of not less than fifty dollars and not more than three hundred dollars for the offense in question can be said to bring the provision prescribing it into conflict with the due process of law clause of the Fourteenth Amendment.

[7] That this clause places a limitation upon the power of the states to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter, and that their enactments transcend the lim-

\*67

itation only where the penalty \*prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously un-

reasonable. *Coffey v. Harlan County*, 204 U. S. 659, 662, 27 Sup. Ct. 305, 51 L. Ed. 666; *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 78, 28 Sup. Ct. 28, 52 L. Ed. 108; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111, 29 Sup. Ct. 220, 53 L. Ed. 417; *Collins v. Johnston*, 237 U. S. 502, 510, 35 Sup. Ct. 649, 59 L. Ed. 1071.

Of this penalty and the need for it the Supreme Court of the State says:

"It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties, and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached." *Chicago, Rock Island & Pacific Ry. Co. v. Davis*, 114 Ark. 519, 525, 170 S. W. 245, 246.

[8] When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Judgment affirmed.

Mr. Justice McREYNOLDS dissents.

(251 U. S. 104)

OKLAHOMA RY. CO. v. SEVERNS PAVING CO. et al.

(Argued Nov. 19 and 20, 1919. Decided Dec. 8, 1919.)

No. 106.

1. MUNICIPAL CORPORATIONS 514(12) — PRESERVATION OF STREET RAILWAY'S RIGHT TO HEARING ON ASSESSMENT OF PROPERTY.

Where a strip of land along the center of a boulevard was dedicated to a street railway by the owners, and an assessment for its proportionate part of the cost of paving was erroneously made against the railway, instead of the property, judgment in proceedings by the city and paving contractor to procure reassessment, directing a reassessment against the land itself, will be modified and corrected to preserve the right of the railway to a new and adequate hearing in respect of the assessment.

2. MUNICIPAL CORPORATIONS 434(6) — FRANCHISE PROVISIONS OF STREET RAILWAY NOT APPLICABLE TO DEFEAT ASSESSMENT FOR PAVING COST.

Terms in original franchise granted by Oklahoma City to a street railway, requiring it, under given conditions, to pave or pay for paving



certain portions of occupied streets, held not applicable, where a strip of land through the center of a boulevard has been dedicated by the owners to the railway's use, and so has become its property, to defeat assessment of a fair share of the cost of the improvement to the land itself owned by the railway.

In Error to the Supreme Court of the State of Oklahoma.

Action by the Severns Paving Company and the City of Oklahoma City against the Oklahoma Railway Company. To review a judgment for the Paving Company, defendant Railway Company brought error to the Supreme Court of Oklahoma, which affirmed (170 Pac. 216), and the Railway Company brings error. Modified and affirmed.

Messrs. John B. Dudley, Henry G. Snyder, and Henry E. Asp, all of Oklahoma City, Okl., for plaintiff in error.

Mr. D. A. Richardson, of Oklahoma City, Okl., for defendants in error.

\*106

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

In 1909 the owners platted Linwood Place, adjacent to Oklahoma City, for building lots, streets, etc. To procure extension of a street car line therein, they dedicated a strip forty feet in width, lying along the center of what is now known as Linwood Boulevard, to plaintiff in error's predecessor, "its successors and assigns, with a like effect as though deeded and conveyed to said company in fee simple by separate deed," on condition, however, that the property should be subject to reasonable police regulations, that the grantee should construct crossings over the tracks and also put down curbing and pave the crossings whenever the boulevard itself should be paved. Subordinate to above grant the streets as shown on the plat were dedicated to the public for ordinary purposes of travel. Afterwards car tracks were laid in the center of the forty-foot strip and the corporate limits of Oklahoma City were extended to include Linwood Place.

In order to provide funds for paying the public roadways along Linwood Boulevard, the city undertook in 1910 to lay a tax upon the adjacent property, and directed that it be apportioned according to benefits. The board of commissioners apportioned to the central strip as its proper share of the expenses, \$12,046.16. Instead of assessing this amount directly against the property, the city council erroneously assessed it against the street car

company. Thereafter, the city and the Severns Company, which had put down the paving, procured from the district court of Oklahoma county a mandamus directing a reassessment against the land itself, but a hearing upon objections thereto was not specifically provided for.

[1] The Supreme Court of the state (170 Pac. 216) declared:

"The fee title to the strip of land in question

\*107

\*here appears to be in the railway company. \* \* \* Its right is not merely an intangible privilege or an easement, but under the terms of the dedication is a fee simple title. \* \* \* The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right-of-way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles."

It then held the land was subject to assessment according to benefits resulting from the paving, and—

"that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company an opportunity will be given to the company to be heard and to complain or object to the amount of the assessment."

Nevertheless, it ordered an affirmance of the judgment of the trial court, without more, and by so doing left in serious doubt the right of plaintiff in error to a new and adequate hearing in respect of the assessment. We think, therefore, that the judgment below should be modified and corrected so as definitely to preserve such right. So modified, it is affirmed. The costs here will be equally divided.

[2] The terms and conditions in the original franchise granted by Oklahoma City to the plaintiff in error, which require it, under given conditions, to pave or pay for paving certain portions of occupied streets, are not applicable in the circumstances here presented and cannot be relied upon to defeat the assessment now in question. The land supposed to be benefited belongs to the company; the city has made no contract which prevents imposition upon it of a fair share of the cost of beneficial improvements. *L. & N. R. R. Co. v. Barber*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819.

Modified and affirmed.



(251 U. S. 41)

ERVIE, Commissioner of Public Lands of  
New Mexico, v. UNITED STATES.(Submitted Nov. 11, 1919. Decided Dec. 8,  
1919.)

No. 72.

PUBLIC LANDS — 65 — MISAPPLICATION OF  
PROCEEDS OF GRANTS TO STATE FOR SPECIFIC  
PURPOSES.

In view of the Enabling Act of June 20, 1910, whereby Congress granted to the state of New Mexico certain public lands for specified purposes, providing that the natural products and money proceeds of such lands should be subject to the same trusts as the lands themselves, and declaring that disposition of any of the lands, or money or value derived from them, for any object other than those enumerated, should be deemed a breach of trust, which grant was accepted by Const. N. M. art. 21, §§ 9, 10, Laws N. M. 1915, c. 60, authorizing the state commissioner of public lands to expend 3 per cent. of the annual income from leases and sales in advertising the advantages of the state to home seekers and investors, *held* invalid in any application to the proceeds of trust lands, so that compliance therewith by the commissioner will be enjoined.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Robert P. Ervie, Commissioner of Public Lands of the State of New Mexico. From a decree for defendant, the United States appealed to the Circuit Court of Appeals, which reversed and remanded, with directions to enter decree for the United States (246 Fed. 277, 159 C. C. A. 7), and defendant appeals. Affirmed.

Mr. A. B. Renahan, of Santa Fé, N. M., for appellant.

Mr. Assistant Attorney General Frierson, for the United States.

\*45

\*Mr. Justice McKENNA delivered the opinion of the Court.

Suit to enjoin the expenditure by appellant, commissioner of public lands of the state of New Mexico, of any of the funds derived from the sale and lease of lands granted and confirmed to the state by the act admitting her into the Union. The right to sell or lease is asserted under a certain act of New Mexico entitled "An act concerning the publicity and promotion of public resources and welfare." Laws 1915, c. 60.

The Enabling Act was passed June 20, 1910 (36 Stat. 557, c. 310), and on August 21, 1911, by a joint resolution of the Senate and House of Representatives, New Mexico and Arizona were admitted into the Union upon an equal footing with the original states.

By the Enabling Act certain grants of public lands were made to New Mexico for pur-

poses of which there was a specific enumeration.

It is provided by section 10 of the act that the lands granted and transferred thereby—"shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

And it is further provided that—

"The disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

It is made the duty of the Attorney General of the United States to prosecute in the

\*46

name of the \*United States such proceedings at law or in equity as may be necessary to enforce the provisions of the act "relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

The constitutional convention was required to provide, by an ordinance irrevocable without the consent of the United States and the people of the state, that the state and its people consent to the provisions of the act, and the Constitution of the state did so provide.

The Legislature of the state on March 8, 1915, passed over the Governor's veto an act entitled as we have designated, the first section of which is as follows:

"Section 1. It shall be unlawful for the commissioner of public lands to expend for making known the resources and advantages of this state generally and particularly to homeseekers and investors, more than three cents on the dollar of the annual income of his office from sales and leases of lands, but, up to such limit of money annually, he may give or cause to be given publicity to such resources and advantages, and do or cause to be done all incidental work, in his judgment advisable to be done."

The commissioner receives from sales and leases of the lands granted a large income annually, the income for the year ending December 31, 1914, being approximately \$741,000, and he threatens to expend three cents on the dollar of the annual income derived from sales and leases to give publicity to the resources and advantages of the state generally in conformity with the act of the Legislature of March 8, 1915, and, unless restrained, will do so.

The answer, though in form a denial of some of the averments of the bill and an ad-

mission of others, is really an objection to its sufficiency to authorize the relief prayed, and the ground of objection is that the bill taken as a whole—

"is no more than an attempt to interfere with the due administration of a trust estate by the

\*47

trustee, the \*State of New Mexico, which requires the payment of necessary and proper expenses out of the income or proceeds of the trust property, the grantor of the trust, the government of the United States, having made no other provision for the payment of such necessary and proper costs and expenses; and defendant avers that the expenditure of a small portion of such income and proceeds for the purpose of advertising the resources of the state and the value of its lands, with the hope of thereby increasing the demand for the purchase and leasing of such lands and in the enhancing of the prospective prices to be derived therefrom, is a proper and necessary expense of the administration of said trust estate."

A temporary injunction was applied for and denied and subsequently the case by stipulation was submitted upon bill and answer, upon which it was ordered that the bill be and it was dismissed.

The decree was reversed by the Circuit Court of Appeals and the case remanded with direction to enter a decree for the United States. This appeal was then prosecuted.

The case is not in broad range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose; and to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be,

\*48

that the state might be tempted \*to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity.

It must be admitted there was enticement to it and a prospect of realization, and such was the view of the District Court. The court was of opinion that a private proprietor of the lands would without hesitation use their revenues to advertise their advantage and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the state.

The phrase, however, means no more in

the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary. We approve, therefore, its conclusion and affirm its decree.

Affirmed.

(251 U. S. 32)

CITY OF LOS ANGELES et al. v. LOS ANGELES GAS & ELECTRIC CORPORATION.

(Argued Oct. 23, 1919. Decided Dec. 8, 1919.)

No. 50.

1. EMINENT DOMAIN ⇨2(1) — INTERFERING WITH FRANCHISE RIGHTS WITHOUT COMPENSATION.

A city's right to erect its own lighting system does not pertain to its governmental capacity nor its police power, but rather to its proprietary or quasi private capacity, and it may not as a matter of public right, and without compensation, clear a space for the instrumentalities of its system by removing or relocating the instrumentalities of the system of a lighting company occupying the streets by virtue of a franchise legally granted, rights under which constitute property.

2. EMINENT DOMAIN ⇨274(2)—CITY WRONGFULLY EXCEEDING POWERS MAY BE RESTRAINED.

A city, engaged in installing municipal lighting plant, may be restrained from proceeding under ordinance to remove or relocate instrumentalities of lighting company, to make room for instrumentalities of city; such ordinance not providing compensation for such removal or relocation.

3. INJUNCTION ⇨211—CONSTRUCTION OF RESERVATION IN DECREE.

Provision of a decree, restraining a city from interference with a lighting company's instrumentalities in a street, that nothing herein shall be construed as restraining it from carrying into effect any ordinance for removal or relocations of the company's instrumentalities, held made only in prudence, and not to define the existence or extent of power, and forestall their challenge, but to leave both to the occasion when either of them might be asserted or denied.

Mr. Justice Pitney and Mr. Justice Clarke, dissenting.

Appeal from the District Court of the United States for the Southern District of California.

Suit by the Los Angeles Gas & Electric Corporation against the City of Los Angeles and others. From a decree for complainant (241 Fed. 912), defendants appeal. Affirmed.



\*33

\*Mr. W. B. Mathews, of Los Angeles, Cal., for appellants.

Messrs. Paul Overton and Herbert J. Goudge, both of Los Angeles, Cal., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

The appellant city is a municipal corporation of the State of California and the other appellants are its officers, having official relation to it and its rights and powers.

The appellee is a California corporation invested with and in exercise of a franchise for generating and selling electricity through a system of poles and wires and other works in the public streets of Los Angeles, among others, in that known as York Boulevard.

It, the appellee—to which we shall refer as the corporation—brought this suit in the District Court to declare invalid and restrain the execution of an ordinance of the city providing for a municipal electric street-lighting system and making way for it in such way, it is charged, that it obstructed, tres-

\*34

passed upon and made dangerous \*the system of the corporation in violation of its rights under the Constitution of the United States.

The District Court granted the prayer of the bill upon the grounds relied on and hence the appeal from its decision direct to this Court.

The ordinance attacked is very long by reason of its repetitions. It, however, can be intelligibly reduced to a few provisions. It was passed March 6, 1917, and approved the next day, and declares in its title its purpose to be to provide for the removal and relocation of poles and other property in the public streets of the city "when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained." Such system and its installation "as speedily as may be practicable" is declared necessary "for the public peace, health and safety."

It is recited that certain "fixtures, appliances and structures" (they are enumerated) are maintained in the streets and it is necessary "in order that sufficient space may be secured for the said municipal electrical system \* \* \* and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of poles and other properties so maintained by such persons and corporations."

It is therefore ordained that (section 1) whenever it shall appear to the Board of Public Works that the removal or relocation of such "fixtures, appliances or structures" (there is an enumeration again which we omit as useless repetition) is necessary in order that the municipal system may have place, the Board shall give notice to the person, firm or corporation owning or controlling the property to remove or relocate the same. The

notice to designate the property to be removed and the place to which it shall be removed, and it shall be the duty of such person, firm or corporation to comply with the notice within five days of its receipt. To

\*35

fail or refuse to so \*comply or to diligently prosecute the work of removal is made unlawful (sections 2 and 3) and (section 4) made a misdemeanor punishable by a fine of not more than \$500 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment. Each day's delay is made a separate offense.

In case of failure to remove or prosecute the work of removal the Board of Public Works is given power to do what the notice directs. (Section 5.)

By section 6 the dependency of the city upon private contracts for lighting the public streets and other public places is declared, some of which contracts, it is said, have expired and all will have expired by July, 1917, thus making the completion of the municipal system necessary to provide for lighting the streets without interruption and the removal or relocation of the appliances owned or controlled by various persons, firms or corporations immediately necessary in order that the city may complete and install its system. And it is declared that the "ordinance is urgently required for the immediate preservation of the public peace, health and safety."

The ordinance was preceded by acts of interference by the city with the property of the corporation in other streets and also in York Boulevard, which interference was enjoined by interlocutory and final decree by the Superior Court of Los Angeles County in a suit brought by the corporation—the city not defending. And it was interference, not displacement, and the court's decree was adapted to the extent of the interference. The decree as to other streets than York Boulevard was as follows:

"\* \* \* From in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff [the corporation in this case]; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any

\*36

wire or cable to or upon \*any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliances or equipment owned or controlled wholly or in part by plaintiff [the corporation in this case], as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State. \* \* \*

As to York Boulevard the decree was as follows:

"\* \* \* From conveying, running or transmitting electric power or energy through the



lines and wires heretofore erected and constructed, by said City of Los Angeles, its agents, servants and employes," until the wires, poles, and equipment of the city are removed to the distance "prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof."

The decree contained a provision upon which the city bases a contention, or rather a suggestion, to which we shall presently refer. The provision is as follows:

"Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said city providing for the removal or relocation of poles, anchors, cross-arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff [the corporation in this case] and located in, upon, over or under any public street or other public place of said city."

The ground or basis of the ordinance of March 6, 1917, here involved is the same as that of the interference in the suit in the state court, that is, the right to displace the corporation's property in order that the municipal system may be operated or erected. There is no attempt here, as there was no attempt in that suit, at absolute displacement. The order of the Board of Public Works, issued in accordance with the direction of the ordinance, required the corporation to change or shift or lower its wires

to \*the detriment of their efficient use, as it is contended. There is some conflict as to the extent and effect which, however, we are not called upon to reconcile. It was stipulated:

"That the value of the right to exercise the franchises of the Los Angeles Gas & Electric Corporation in the public streets and thoroughfares of the city of Los Angeles exceeded the sum of \$3,000 and was in excess of \$4,000."

And it was testified that if the city in constructing its system proceeds as it has done in ordering the removal of poles and wires, it will cost the corporation between \$50,000 and \$60,000; but passing by the particular instance of interference and considering the ordinance's broad assertion of right, the contentions of the city and the corporation are in sharp contradiction.

[1-3] We say "the ordinance's broad assertion of right" to distinguish the narrower right of the city to erect a system of its own. Of the latter right there is no question. The District Court conceded it, indeed praised the project, but decided that it could not be exercised to displace other systems, without compensation, occupying the streets by virtue of franchises legally granted. Thus the only question is whether the city may as matter of public right and without compensation clear a "space" for the instrumentalities of its system by removing or relocating the instrumentalities of other systems. The city

asserts the affirmative—asserts the right to displace other systems as an exercise of the police power, and, further, as an incident of its legislative power. It is further asserted that these powers are attributes of government, and that their exercise when not palpably arbitrary, is not subject to judicial interference, and that—

"Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power [in this case the city]; and a contrary conclusion will never be reached upon light consideration." *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

\*38

\*In counter propositions the corporation urges its franchise and the right it conveys to occupy the streets of the city, rights, it is said, having the inviolability of a contract and the sanctity of private property, not indeed free from reasonable regulation, if such regulation is governmental, but free from molestation or displacement to make "space" for a city system, for that is proprietary. We have, therefore, the not unusual case of rights asserted against governmental power—a case somewhat fruitful of disputable considerations and upon which judgment may not be easy or free from controversy. But there is some point where power or rights must prevail, however plausible or specious the argument of either against the other may be. As for example, in the present case. The city has undoubtedly the function of police; it undoubtedly has the power of municipal lighting and the installation of its instrumentalities (*Russell v. Sebastian*, 233 U. S. 195, 202, 34 Sup. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282); but function and power may be exceeded and so far as wrongful be restrained. And such was the conclusion of the District Court applying the Constitution of the United States, and such the ground of its judgment.

In what way the public peace or health or safety was imperiled by the lighting system of the corporation or relieved by its removal or change, the court was unable to see and it is certainly not apparent. The court pointed out that there were several lighting systems in existence and occupying the streets and that there was no contest, or disorder or overcharge of rates or peril, or defect of any kind, and therefore concluded that the conditions demonstrated that while the city might install its own system there was no real "public necessity" arising from consideration of public health, peace or safety requiring the city to engage in the business of furnishing light.

The court reasoned and concluded that what the city did was done not in its governmental capacity—an exertion of the police

\*39

power—but in its "proprietary or quasi \*private capacity" and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occu-

pant of the field. The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court. *Vilas v. Manila*, 220 U. S. 345, 31 Sup. Ct. 416, 55 L. Ed. 491; *Russell v. Sebastian*, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282; *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; *New Orleans v. Drainage Comm.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 508, 27 Sup. Ct. 762, 51 L. Ed. 1155.

The city's contentions are based on a confusion of these capacities and the powers or rights respectively attributed to them and upon a misunderstanding of the reservations in the decree of the state court. The reservations were made only in prudence, not to define the existence or extent of powers, and forestall their challenge, but to leave both to the occasion when either of them might be asserted or denied. And it is clear that it was not intended to confound the capacities in which the city might act and the relation of the city's acts to those capacities.

It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation.

The franchise of the present controversy was granted prior to 1911 and hence has the attributes and rights described in *Russell v. Sebastian*, supra. Its source, as was that of the franchise in that case, is the Constitution

\*40

of the State and is that "of using the public streets and thoroughfares thereof \* \* \* for introducing into and supplying" a city "and its inhabitants either with gaslight or other illuminating light." We said of such that—

The "breath of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light."

And again:

"The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual

or corporation had received a special grant of the described street rights in the city which was to be served."

We can add nothing to this definition of rights, and, we may repeat, they did not become immediately violable or become subsequently violable.

It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated.

We think, therefore, that the decree of the District Court protecting the corporation's rights from disturbance under the ordinance in question must be and it is

Affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent.

(251 U. S. 22)

PACIFIC GAS & ELECTRIC CO. v. POLICE COURT OF CITY OF SACRAMENTO, CAL., et al.

(Submitted Oct. 9, 1919. Decided Dec. 8, 1919.)

No. 31.

1. COURTS  $\S$ 374—ASSUMPTION OF JURISDICTION QUESTION OF STATE LAW NOT REVIEWABLE BY FEDERAL COURT.

Where the District Court of Appeal of California assumed jurisdiction of an application for certiorari to review judgments in a criminal action against petitioner for violation of a city ordinance and the Supreme Court of the state declined to review the judgment of the District Court of Appeal for its own want of jurisdiction, whether the District Court of Appeal rightfully assumed jurisdiction on certiorari is a question of purely state law, which the Supreme Court of the United States may not review; judgment of the District Court of Appeal being the judgment of the state court of last resort having power to consider the case.

2. STREET RAILROADS  $\S$ 76—POLICE POWER AS TO SPRINKLING STREETS.

If the police power of a city to provide by a sprinkling ordinance for the protection of the health and safety of the people was unrestrained by any contract provision, binding as between the city and the street railway required to sprinkle its tracks, the police power of the city necessarily dominated the right of the company under its franchises to use the streets, and subjected such rights to the city's authority to adopt the sprinkling ordinance.



**3. CONSTITUTIONAL LAW** ⚡297 — DUE PROCESS CLAUSE NOT LIMITING POLICE POWER OF STATES.

The due process clause of the Fourteenth Amendment to the federal Constitution does not restrain the states in the exercise of their legitimate police power, such as a regulation requiring street railroads to sprinkle streets used.

**4. STREET RAILROADS** ⚡76—SPRINKLING ORDINANCE WITHIN POLICE POWER.

The regulation of a city ordinance, requiring a street railway to sprinkle its tracks during the months of June, July, August, September, and October of each year, was inherently within the police power of the state, delegated to the city.

**5. CONSTITUTIONAL LAW** ⚡297 — STREET SPRINKLING ORDINANCE NOT VIOLATIVE OF DUE PROCESS CLAUSE.

Ordinance of a city requiring a street railway during the months of June, July, August, September, and October of each year to sprinkle its tracks and for a distance beyond sufficient to lay dust, etc., held not violative of the due process clause of the Fourteenth Amendment to the federal Constitution as an abuse of the power of the state, delegated to the city.

**6. CONSTITUTIONAL LAW** ⚡241—SPRINKLING ORDINANCE NOT VIOLATIVE OF GUARANTY OF EQUAL PROTECTION OF LAW.

Ordinance of a city, requiring a street railway during the months of June, July, August, September, and October of each year to sprinkle its tracks and for a distance beyond sufficient to lay dust, etc., held not violative of the equal protection of the law clause of the Fourteenth Amendment to the federal Constitution, as resting on an improper basis for classification between street cars moving on tracks and other vehicles in the streets.

In Error to the District Court of Appeal for the Third Appellate District, State of California.

Application for certiorari by the Pacific Gas & Electric Company against the Police Court of the City of Sacramento and the Superior Court of California and its judges, to review and annul a judgment imposing a penalty against petitioner for violation of a city ordinance. Order to show cause was discharged, and writ denied by the District Court of Appeal of California (28 Cal. App. 412, 152 Pac. 928), and petitioner brings error. Affirmed.

\*23

\*Mr. Wm. B. Bosley, of San Francisco, Cal., for plaintiff in error.

Mr. Edward M. Cleary, of Washington, D. C., for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

By ordinance the city of Sacramento made it the duty of—

"every person, firm or corporation owning, controlling or operating any street railroad, sub-

urban railroad, or interurban railroad upon and along any of the streets of the city of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation."

The gas company, plaintiff in error, operated lines of street railway in Sacramento under franchise granted by the city. It refused to obey the ordinance and was prosecuted in the city police court and there asserted that the ordinance was in conflict with the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

From a sentence imposing upon it a money penalty, it appealed to the superior court for the county of Sacramento, and from the

\*24

judgment of that court confirming the conviction it prosecuted an appeal to the Supreme Court of the state, which court refused to review the case on the ground that it was without jurisdiction. Thereupon the company, alleging the illegality of the conviction upon various grounds, among others that the ordinance was repugnant to the Fourteenth Amendment, petitioned the District Court of Appeal for the Third Appellate District for a writ of certiorari requiring the superior court to send up the record for review. The petition was demurred to as stating no cause of action and on the further ground that it disclosed no jurisdiction in the court to review. Although it expressed doubt on the subject, the court took jurisdiction, reviewed the conviction, held that the city had power under the state Constitution and laws to pass the ordinance and that it was not repugnant to the Constitution of the United States. The certiorari was refused. A review of this judgment was then asked at the hands of the Supreme Court of the state, but that court again refused to interfere on the ground of its want of jurisdiction. The writ of error which is before us was then prosecuted by the gas company to the judgment of the District Court of Appeal refusing to grant the writ of certiorari.

[1] At the threshold a motion to dismiss requires to be considered. It is based upon the ground that the court below had, under the state Constitution and laws, no power to review by certiorari the action of the superior court and therefore that court was the court of last resort competent to decide the cause. But this disregards the fact that the District Court of Appeal assumed jurisdiction of the cause and that the Supreme Court



of the state declined to review its judgment for want of jurisdiction. As whether, under the circumstances, the District Court of Appeal rightfully assumed jurisdiction by certiorari is a question of purely state law which we may not review, the judgment of

\*25

that court is the judgment of the state court of last resort having power to consider the case and the motion to dismiss is denied.

[2] Besides the due process and equal protection clauses of the Fourteenth Amendment, the contract clause of the Constitution of the United States is relied upon in the assignments. In argument however that contention is based, not upon the impairment by the ordinance of any particular contract right, but upon the unwarranted burden which it is asserted would result from enforcing the ordinance as against the railroad company because of the general authority which it possessed under its franchises to operate its railroad in the streets. But this at once establishes that the consideration of the contract clause is negligible and hence that it is only necessary to pass upon the contentions under the due process and equal protection clauses. This results, since if the police power of the city, to provide by the ordinance for the protection of the health and safety of the people, was unrestrained by any contract provision, the police power necessarily dominated the right of the company under its franchises to use the streets and subjected that right to the authority to adopt the ordinances in question.

[3] Further, as the right of the city to adopt such ordinance, so far as the state Constitution and laws are concerned, is concluded by the decision below and as it is elementary that the due process clause of the Fourteenth Amendment does not restrain the states in the exercise of their legitimate police power, it follows that the case narrows down to a consideration of whether the ordinance in question was generically embraced by the police power of the state and, if it

40 SUP.CT.—6

was, whether the power was so abused as to cause its exertion to exceed the limits of the police power, thus bringing the ordinance under the prohibitions of the due process and equal protection clauses of the Fourteenth Amendment.

[4] That the regulation made by the ordi-

\*26

nance was inherently within the police power is we think too clear for anything but statement. We cite in the margin, however, decided cases dealing with the subject, in some of which the power here in question when exerted for the same purpose and to the same extent was upheld, and in others of which, although the manifestations of the exercise of the power were somewhat different, its existence was accepted as indisputable, and to text-writers who state the same view.<sup>1</sup>

[5, 6] That the power possessed was on the face of the ordinance not unreasonably exerted and therefore that its exercise was not controlled by the due process clause of the Fourteenth Amendment is, we are also of opinion, equally clear. And this is true likewise of the contention as to the equal protection clause of the amendment, since that proposition rests upon the obviously unwarranted assumption that no basis for classification resulted from the difference between the operation of the street railway cars moving on tracks in the streets of the city and the movement of a different character of vehicles in such streets.

Affirmed.

<sup>1</sup> Milwaukee v. Milwaukee E. R. & L. Co., 144 Wis. 386, 129 N. W. 623; Savannah Ry. v. Mayor, 77 Ga. 731, 4 Am. St. Rep. 106; State v. Canal & C. R. Co., 50 La. Ann. 1189, 24 South. 265, 56 L. R. A. 287; St. Paul v. St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108, 36 L. R. A. (N. S.) 235, Ann. Cas. 1912B, 1136; Newcomb v. Norfolk Western Street Ry. Co., 179 Mass. 449, 61 N. E. 42; Elliott on Railroads, § 1082; Dillon on Municipal Corporations (5th Ed.) § 1276; Nellis, Street Railways, § 157; McMillan on Municipal Corporations, § 3774; Elliott on Roads and Streets, § 958.

(251 U. S. 68)

CORSIKANA NAT. BANK OF CORSICANA  
v. JOHNSON.(Argued and Submitted Jan. 16, 1919. De-  
cided Dec. 8, 1919.)

No. 23.

1. BANKS AND BANKING ⚡253—LIABILITY  
OF NATIONAL BANK DIRECTOR FOR EXCESSIVE  
LOAN.

In order for a bank to prevail in its action, under Rev. St. § 5239 (Comp. St. § 9831), to recover from its former vice president and director damages through his having knowingly violated the provisions of section 5200, as amended June 22, 1906 (Comp. St. § 9761), by participating in a loan of the bank's funds to an amount exceeding one-tenth of its paid-in capital and surplus, it must appear, not only that the liabilities of a borrower to the bank were permitted to exceed the prescribed limit, but that defendant, while a director, participated in or assented to the excessive loan or loans, knowingly and in effect intentionally; and deliberate refraining from investigation of that which it was his duty to investigate amounting to an intentional violation of the statute.

2. TRIAL ⚡178—REVIEW OF EVIDENCE AFTER  
DIRECTION OF VERDICT.

To test the propriety of the peremptory instruction for defendant given by the trial judge, the reviewing court must bring into view the facts and reasonable inferences which tended to a different conclusion, and, where the evidence was in substantial dispute, must adopt a view of it favorable to plaintiff.

3. TRIAL ⚡139(1)—WEIGHT OF EVIDENCE A  
JURY QUESTION.

Where there was substantial evidence tending to support a view of disputed facts favorable to plaintiff's contentions, what weight should be given such evidence was for the jury, not the court, to determine.

4. BANKS AND BANKING ⚡254—EVIDENCE  
SHOWING EXCESSIVE LOAN BY DIRECTOR OF  
NATIONAL BANK.

In a national bank's action against its former vice president and director, brought under Rev. St. § 5239 (Comp. St. § 9831), to recover damages sustained through his having violated section 5200, as amended June 22, 1906 (Comp. St. § 9761), by making an excessive loan of the bank's funds, evidence held to warrant finding, despite defendant's denial, that in fact the disputed transaction was a single loan of \$30,000, less discount of \$900, made jointly to partners engaged in the banking business, that defendant knew and assented to the fact at the time, and that the taking of two notes, one from each borrowing partner, was merely a device to conceal the true nature of the transaction as exceeding plaintiff bank's lending capacity of a tenth of its capital and surplus of \$100,000 each.

5. STATUTES ⚡219—CONSTRUCTION OF NA-  
TIONAL BANK ACT IN ACCORDANCE WITH  
RULINGS OF COMPTROLLER.

The Supreme Court of the United States will accept as a practical construction of Rev.

St. § 5200, as amended June 22, 1906 (Comp. St. § 9761), prohibiting a loan of a national bank's funds to an amount exceeding one-tenth of its paid-in capital and surplus, the practice and administrative rulings of the Comptroller of the Currency that liabilities incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation of liabilities, to determine whether the statutory limit is exceeded.

6. BANKS AND BANKING ⚡253 — LIABILITY  
OF DIRECTOR FOR EXCESSIVE LOAN.

Former vice president and director of a national bank is liable to the bank, under Rev. St. § 5239 (Comp. St. § 9831), for damages sustained through a loan of the bank's funds to an amount exceeding one-tenth of its paid-up capital and surplus, in violation of section 5200 (Comp. St. § 9761), whatever the supposed standing of the borrowers, personal or financial, despite the absence of any improper motive or desire for personal profit on defendant director's part, and although the bank, despite loss on the transaction, remained solvent, or even prosperous; also despite the fact that other officers or directors were in part responsible for the loan, while defendant director alone is sued, and though new stockholders in the bank, whose control has resulted in the suit, were aware of the excessive loan and defendant director's alleged liability before they bought stock.

7. PARTIES ⚡27—SUIT AGAINST ONE OR SEV-  
ERAL OF JOINT TORT-FEASORS.

The party injured by a tort may sue one or several of the joint participants.

8. LIMITATION OF ACTIONS ⚡39(1)—NATION-  
AL BANK'S ACTION AGAINST DIRECTOR FOR  
DAMAGES FROM EXCESSIVE LOAN.

In an action by a national bank against its former vice president and director, under Rev. St. § 5239 (Comp. St. § 9831), to recover damages for an excessive loan made by defendant director in violation of section 5200, the two-year limitation of Vernon's Sayles' Civ. St. Tex. 1914, art. 5687, was inapplicable; the action being within the general description of article 5690, and subject only to the limitation of four years thereby prescribed.

9. BANKS AND BANKING ⚡254—ACCRUAL TO  
NATIONAL BANK OF CAUSE OF ACTION  
AGAINST DIRECTOR MAKING EXCESSIVE LOAN;  
CONDITIONS PRECEDENT.

A national bank's cause of action against its former director and vice president, under Rev. St. § 5239 (Comp. St. § 9831), for damages for an excessive loan knowingly made by him in violation of section 5200 (Comp. St. § 9761), accrued when the bank through his act parted with the money loaned, receiving in return only negotiable paper that it could not lawfully accept, because the transaction was prohibited, and the bank was not obliged to await the maturity of the notes or pursue its remedies against the borrowers, or await the liquidation of their estates before claiming loss and suing the director, though whatever of value the bank recovered from the borrowers on the loan would go in diminution of damages, for

the statutory director's liability is a direct liability, not contingent or collateral.

**10. BANKS AND BANKING** ⚡253—EXTENT OF LIABILITY OF DIRECTOR OF NATIONAL BANK FOR EXCESSIVE LOAN.

Where a director of a national bank having a capital and surplus of \$200,000, in violation of Rev. St. § 5200 (Comp. St. § 9761), made a loan of \$30,000 to a single firm, such director was liable, under section 5239 (Comp. St. § 9831), to the bank for the entire damages occasioned to it by such illegal loan; his liability not being limited only to the amount of the loan in excess of the \$20,000, which, in view of the amount of the bank's capital and surplus of \$200,000, might lawfully have been loaned.

**11. BANKS AND BANKING** ⚡232—IDENTITY BETWEEN NATIONAL BANK AND LOAN COMPANY ORGANIZED BY IT.

A national bank and a loan company formed by it and having the same stockholders were distinct legal organizations, and possessed independent powers and privileges, and so, notwithstanding the identity of stock ownership and affiliation in management, for some purposes must be regarded as separate corporations, for instance, as being capable of contracting with each other; but in considering the effect of intercorporate dealings, especially as bearing on the duties of the common directors and the authority of stockholders to control them, the identity of stock ownership should not be overlooked, and a transfer of notes from the bank to the loan company in consideration of full face value could have no effect in relieving the stockholding interest from loss, since any saving that accrued to one as stockholder of the bank would be balanced by a corresponding loss as stockholder of the loan company, but the stockholders, in reviewing such transfer, might base their action on all the facts of the situation, recognizing the legal separateness of the corporations as existing, in order to test the validity of the transfer.

**12. BANKS AND BANKING** ⚡253—DAMAGES OF NATIONAL BANK FROM EXCESSIVE LOAN NOT AVOIDED BY TRANSFER OF NOTES, UNLESS VALID.

Where a national bank, whose director and vice president, in violation of Rev. St. § 5200 (Comp. St. § 9761), had made a loan exceeding in amount one-tenth of the bank's capital and surplus, transferred to a loan company for face value the notes received, there was a prima facie satisfaction of the damages the bank had sustained by reason of the excessive loan, relieving the director from liability under section 5239; but if the transaction was invalid as against the loan company or its stockholders, or was voidable by the loan company or its stockholders, neither the bank nor its director was entitled to have the transaction stand for their benefit.

**13. CORPORATIONS** ⚡318—TRANSACTIONS BETWEEN COMPANIES MANAGED BY SAME DIRECTORS.

That two corporations have a majority or even the whole membership of their boards of

directors in common does not necessarily render transactions between them void, but transactions through officers or directors acting at the same time for both companies are presumptively fraudulent, and therefore voidable by stockholders within a reasonable time after discovery, unless expressly authorized or ratified by the stockholders, certainly where the circumstances show the transaction would be of great advantage to one at the expense of the other company, especially where the personal interest of all or any directors would be enhanced.

**14. BANKS AND BANKING** ⚡254—TRANSFER OF NOTES RECEIVED BY NATIONAL BANK ON EXCESSIVE LOAN VOIDABLE AS FRAUD ON TRANSFEREE.

In an action by a national bank to enforce the liability of its former director and vice president, under Rev. St. § 5239 (Comp. St. § 9831), for having made a loan of more than one-tenth of the bank's paid-in capital and surplus, in violation of section 5200 (Comp. St. § 9761), evidence held sufficient to justify finding that the transfer by the bank to a loan company for face value of the notes received on the occasion of the excessive loan was fraudulent, as against the loan company and as against the stockholders, both of it and the bank, and therefore was voidable, so that, the transfer being rescinded by the loan company, defendant director cannot claim that on account of the transfer the bank sustained no damage through the excessive loan.

**15. CORPORATIONS** ⚡318 — RESCISSION OF VOIDABLE TRANSFER BY DUMMY DIRECTORATES.

Where a national bank made a loan excessive under Rev. St. § 5200 (Comp. St. § 9761), as for more than one-tenth of its capital and surplus, and subsequently transferred the notes received for face value to a loan company formed by it and owned by its stockholders, the fact that subsequently, when other stockholders had gained control of the bank and loan company, they sought to rescind the transaction, and did so through mere figureheads or dummies on the two boards of directors involved, did not invalidate such rescission; it not being necessary to change the membership of the boards.

**16. BANKS AND BANKING** ⚡253 — DIRECTOR SUED FOR ILLEGAL LOAN NOT ENTITLED TO QUESTION VALUE IN TRANSFER INVOLVED.

Former vice president and director of plaintiff national bank, sued under Rev. St. § 5239 (Comp. St. § 9831), to enforce his liability for damages occasioned by a loan of the bank's funds, violative of section 5200 (Comp. St. § 9761), as exceeding one-tenth of its capital and surplus, held not entitled to raise any inquiry into the value of cotton mill property transferred by the bank to a loan company organized by it and owned by its stockholders, on a retransfer to it by the loan company of notes received by the bank on the occasion of the illegal loan, and first transferred by the bank to the loan company at face value, to make possible the claim that the bank had sustained no loss through the loan.



In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by the Corsicana National Bank of Corsicana against Samuel Wistar Johnson. From a judgment for defendant, plaintiff appealed to the Circuit Court of Appeals, which affirmed (218 Fed. 822, 134 C. C. A. 510), and plaintiff brings error. Judgment reversed, and cause remanded to the District Court, for further proceedings in conformity with the opinion.

\*70

\*Messrs. Joseph Manson McCormick and Francis Marion Etheridge, both of Dallas, Tex., for plaintiff in error.

Messrs. Cullen F. Thomas, of Dallas, Tex., W. J. McKie, of Corsicana, Tex., and Henry C. Coke, of Dallas, Tex., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

This was an action brought under section 5239, Rev. Stat. U. S. (Comp. St. § 9831), in the then Circuit (now District) Court of the United States for the Northern District of Texas by plaintiff in error, a national banking association which we may call for convenience the bank, against defendant in error, formerly a member of its board of directors and its vice president, to hold him liable personally for damages sustained by the bank in consequence of his having knowingly violated, as was alleged, the provisions of section 5200, Rev. Stat., as amended June 22, 1906 (34 Stat. 451, c. 3516 [Comp. St. § 9761]), by participating as such director and vice president in a loan of the bank's funds to an amount exceeding one-tenth of its paid-in capital and surplus.

The action appears to have been commenced in February, 1910, and, after delays not necessary to be recounted, was tried before the District Court with a jury. A verdict was directed in favor of defendant, and the judgment thereon was affirmed by the Circuit Court of Appeals, no opinion being delivered in either court. The judgment of affirmance is now under review.

The amended section 5200, Rev. Stat., as it stood at the time the alleged cause of action arose, reads as follows, the matter inserted by the amendment being indicated by brackets:

"Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, includ-

\*71

ing in the liabilities of a company \*or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in [and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, that the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association]. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of

commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

The pertinent portion of the other section reads as follows:

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. \* \* \* And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

[1] Under the rule settled by familiar decisions of this court, in order for the bank to prevail in this action it must appear not only that the liabilities of a person, company, firm, etc., to the bank for money borrowed were permitted to exceed the prescribed limit, but that defendant, while a director, participated in or assented to the excessive loan or loans, not through mere negligence, but knowingly and in effect intentionally (Yates v. Jones Nat. Bank, 206 U. S. 158, 180, 27 Sup. Ct. 638, 51 L. Ed. 1002), with this qualification, that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as

\*72

"in effect intentional" (Thomas v. Taylor, 224 U. S. 73, 82, 32 Sup. Ct. 403, 56 L. Ed. 673; Jones Nat. Bank v. Yates, 240 U. S. 541, 555, 36 Sup. Ct. 429, 60 L. Ed. 788).

[2] The facts are involved, and need to be fully stated. And necessarily, in order to test the propriety of the peremptory instruction given by the trial judge, we must bring into view the facts and the reasonable inferences which tended to a different conclusion, and where the evidence was in substantial dispute must adopt a view of it favorable to plaintiff; but of course we do this without intending to intimate what view the jury ought to have taken, had the case been submitted to it.

On June 10, 1907, plaintiff, whose banking house was at Corsicana, Tex., had \$100,000 capital and \$100,000 surplus, aggregating \$200,000, and making \$20,000 the applicable limit under section 5200. Defendant was a director and vice president of the bank, active—perhaps dominant—in the conduct of its banking business, and familiar with the state of its finances.

The averment of a breach of duty relates to an alleged excessive loan or loans made on or about the date last mentioned to Fred Fleming and D. A. Templeton, who for a considerable time had been engaged in business as private bankers in Corsicana and in several other towns in Texas under the firm name

of Fleming & Templeton, and also had conducted at Corsicana a branch bank for the Western Bank & Trust Company, a state institution of which Fleming was president and Templeton vice president and whose main banking house appears to have been at Dallas, about 50 miles from Corsicana. There was evidence that early in June, 1907, Fleming & Templeton terminated their private banking business at Corsicana and turned over their deposit accounts—between \$30,000 and \$40,000—to the Corsicana National Bank, plaintiff herein, together with money or exchange on the Western Bank & Trust Company sufficient to meet them. Whether the firm was in fact

\*73

dissolved at that time or later, and whether the dissolution applied to their other branches, or to the Corsicana business only, were points concerning which under the evidence there was some doubt.

On or about June 10th, while the president of the bank was absent on vacation, defendant loaned for the bank to Fleming and Templeton \$30,000 (less discount) upon two promissory notes for \$15,000 each, maturing in six months. Defendant testified that both Fleming and Templeton negotiated with him, asking for two separate loans of \$15,000 each, telling him that they had dissolved partnership and were winding up and closing out at Corsicana, and would turn over between \$30,000 and \$40,000 of deposits to the Corsicana National Bank. He further testified:

"One of the considerations of this loan was the transfer of the deposits and with it the accounts of Fleming & Templeton."

He insisted that two separate loans were made, of \$15,000 each, one to Fleming for which Templeton was surety, the other to Templeton for which Fleming was surety. But defendant's own account of the circumstances under which and the special inducement upon which the loan was made, with other evidence to be recited below, left room for a reasonable inference that there was in fact but a single loan, and that separate notes were taken in order to avoid the appearance of a loan in excess of the limit. They were in the usual form of joint and several notes, payable to plaintiff's order. One was signed, "Fred Fleming, D. A. Templeton;" the other, "D. A. Templeton, Fred Fleming"—without naming either maker as surety. Discount to the amount of \$900 was deducted, and the net proceeds, \$29,100, were paid by a draft drawn by the bank on the Western Bank & Trust Company to the order of "Fleming & Templeton," which was sent by mail inclosed in a letter written upon the Bank's letter head, dated June 10, 1907, and addressed to Templeton at Dallas, in which letter, after acknowledging receipt of the two notes for \$15,000 each, "signed by

\*74

\*yourself and Fred Fleming," it was stated:

"We have deducted the discount, \$900.00, and hand you herewith our draft No. A-7830, on Western Bank & Trust Company, order Fleming & Templeton, for \$29,100.00."

The retained copy of this letter appears to have been introduced in evidence; at the foot, opposite the place of signature, are the initials "V. P." With regard to this, as also to certain other "V. P." letters, dated in the following December and relating to renewal of the notes, defendant testified:

"I think I signed the letters which are offered in evidence as Exhibit H," etc.

There was evidence that the draft for \$29,100 was indorsed in the firm name by Templeton and deposited in the Western Bank & Trust Company at Dallas to the credit of the joint account of Fleming & Templeton, to make up in part an overdraft amounting to more than \$125,000; this account having been overdrawn constantly, and in large but varying amounts, since the preceding April.

As a result of an examination of the bank made a few days later, the Comptroller of the Currency wrote to its president under date June 22d, severely criticizing the Fleming-Templeton loan, among others, as excessive under section 5200, R. S., and saying:

"Immediate arrangements must be made to reduce these loans to the legal limit."

It was a fair inference that defendant knew of this letter, or in the proper performance of his duties would have known of it. Whether any reply was made to it did not appear.

Notwithstanding the warning thus given, when the notes matured in December they were renewed with defendant's assent for a further period of six months, joint notes being given to the bank as before, and the further sum of \$900 being paid by Fleming & Templeton to the bank for interest in this way: Plaintiff, under defendant's direction,

\*75

charged the amount in a single item to the Western Bank & Trust Company, for account of the borrowers, and the latter institution acknowledged the charge, gave credit to plaintiff for the amount, and charged it against the joint account of Fleming & Templeton. During December some correspondence passed between defendant at Corsicana, he writing as vice president of the bank, and Templeton at Dallas, relating to the renewal of the notes, tending to show that they were regarded by both writers as representing a single obligation of "Fleming & Templeton." Thus Templeton on December 3d wrote to defendant, "Referring to the notes of Fleming & Templeton," etc.; and defendant wrote to him on the following day, mentioning "renewal notes of loan to you and Mr. Fleming."

The evidence tended to show that up to the time of the renewal the borrowers were



apparently solvent, but that about January 15, 1908, they became manifestly and notoriously insolvent. The Western Bank & Trust Company closed its doors on that date and went into liquidation, with Fleming and Templeton owing it several hundred thousand dollars. About the same time Fleming and perhaps Templeton went into bankruptcy, and Templeton afterwards died, and their respective estates paid small dividends upon their obligations. The jury would have been warranted in finding that it was evident to defendant, as a banker, on and after the 15th of January, that there would be a substantial loss upon the Fleming and Templeton notes.

On February 6, 1908, an official bank examiner visited the bank, with the result that on the 26th the Deputy Comptroller wrote calling the attention of its officers to alleged repeated violations of the national banking law in the conduct of its affairs, specifying certain loans in excess of the limit prescribed by section 5200, among them "Fleming & Templeton, \$30,000," and stating that—

"The directors who are responsible for the  
\*76  
loans or permitted \*them to be made should assume liability for any loss that may be sustained thereon and not throw the burden of such loss on innocent stockholders."

On March 11th the directors, including defendant, united in signing a letter to the Comptroller in reply to his criticisms, among other things saying:

"Reference to the Fleming & Templeton item of \$30,000, we beg to say that this item has been disposed of by the bank and they now owe us nothing."

It was a reasonable inference that defendant intended to admit that it was a single loan and in excess of the limit.

In explanation of the statement that it had been "disposed of by the bank," the evidence tended to show that on February 12, 1908, nearly a month after the insolvency of Fleming and Templeton had become notorious, and a few days after the bank examiner's visit, defendant and the president of the bank caused the two notes of December 10 to be transferred "without recourse" to an affiliated corporation known as the Corsicana National Land & Loan Company (they being directors and officers of this corporation also), upon payment of \$29,400, the full face value, less discount, as consideration; the payment being made by a transfer of credit upon the books of the bank. Defendant relies upon this as wholly relieving the bank from loss by reason of the loan, and consequently as releasing him from responsibility to the bank. But the evidence tended to show further that the loan company in January, 1910, shortly before this suit was brought, rescinded the transaction upon the ground of fraud, and that there was a set-

tlement as between the loan company and the bank, based upon an acknowledgment by the latter of the former's right to rescind.

A brief account of the relations between these two corporations, and of their dealings respecting the notes in question, becomes material. The loan company was organized in the month of May, 1907, under the laws of the state of Texas, with \$50,000 capital

\*77  
stock, and with \*stockholders and directors identical with those of the bank. The capital of the company was subscribed for and paid out of a special dividend declared by the directors of the bank for the purpose, and each stockholder had the same proportion of stock in the company as in the bank. The purpose of the new corporation, as declared in its charter, was the "accumulation and loan of money." Defendant testified:

"The purpose of the loan company, a state corporation, was to take such paper as the bank could not handle. It was organized by the stockholders of the bank, and paid for out of the earnings of our bank. \* \* \* The loans of the loan company were largely real estate loans. It was to help out the bank in every possible [way]."

From the organization of the company in the spring of 1907 until the spring of 1909, defendant was a director and active in the management of the company as well as of the bank. He testified that the stockholders of the two corporations were identical, and continued to be so during the entire period just mentioned; that "whenever there was a sale of bank stock it carried with it that particular shareholder's stock in the loan company." During the same period the two corporations had the same president, vice president, and directors, while the assistant cashier of the bank was secretary of the loan company.

So far as appeared, the transfer of the Fleming and Templeton notes to the loan company, and the payment made by the company to the bank, were never expressly authorized or ratified by the stockholders of either corporation; nor did it appear that the stockholders of the loan company ever authorized its directors to employ its funds in taking bad or doubtful paper off the hands of the bank at a loss, much less to relieve the directors of the bank from responsibility for its losses.

In April or May, 1909, there was a change in the control of the bank, due to sales of a

\*78  
majority of the stock followed \*by a change of officers; defendant retiring as both stockholder and director. The corresponding shares of the stock of the loan company were transferred at the same time, and the new management officered the company as well as the bank. So far as appeared from the evidence, the transfer of defendant's stock carried with it no agreement that he should



not be held responsible to the bank because of the Fleming and Templeton loan, nor any approval of the transfer of the loan to the loan company.

The bank and the loan company held annual meetings of stockholders on January 11, 1910, at which, for the first time so far as appears, the boards of directors were so selected that a majority of one board no longer were directors of the other corporation. This was done by electing, as five out of nine directors of the loan company, individuals holding one share of stock each, recently placed in their names for the purpose of qualifying them. They were not stockholders of the bank; but, except for them, the stockholders of the two corporations still were the same, and it was a reasonable inference that the two meetings were attended by the same individuals. Minutes of these stockholders' meetings, and of certain meetings of the respective boards of directors, were introduced in evidence and supplemented by other testimony, from all of which the following additional corporate proceedings appeared: The stockholders of the loan company, more than a majority in interest being present, unanimously adopted a resolution reciting the taking of the notes of December 10, 1907, by the bank from Fleming and Templeton, and that on or about January 15, 1908, the makers became insolvent and the notes worthless and uncollectible, and setting forth that, with knowledge of this fact, certain of the directors and officers of the bank illegally and wrongfully transferred the notes to the loan company, for which the same officers

\*79

and directors, \*being likewise officers and directors of the loan company, illegally and wrongfully transferred to the bank out of the funds of the loan company the face value of the notes, whereby the bank had committed a wrong upon the loan company and was liable to it therefor, and by this resolution the directors of the company were authorized to adjust and settle this demand against the bank and to tender and return to the bank the Fleming and Templeton notes and indebtedness with any collateral security held for them. The directors of the loan company thereafter and on the same day passed a resolution to the like effect, and appointed a committee to make demand upon the bank for return of the money wrongfully transferred to the bank for the notes and to adjust and settle this demand; the notes and indebtedness of Fleming and Templeton and any collateral security held therefor being at the same time tendered and ordered to be returned to the bank. This committee appeared before the stockholders' meeting of the bank and formally presented the demand, whereupon these stockholders authorized their board of direc-

tors to act upon the claim made on the bank by the loan company and to adjust and settle it, if they should conclude that the bank was liable to the loan company; otherwise, to reject it. A few days later a meeting of the new board of directors of the bank was held, at which a communication from the loan company committee was presented, in substance the same as that previously presented to the bank stockholders, and the resolution of the bank stockholders thereon was read; and thereupon the directors authorized the president of the bank, if he believed the claim of the loan company to be just, to proceed to settle it in such a way as he might deem to be to the best interest of the bank. Under this authority, the president of the bank communicated to the loan company committee in substance that the bank recognized the legality and justness of

\*80

the claim of the loan company and \*would pay it, provided the company would purchase from the bank a certain cotton mill property for the sum of \$65,000, accept \$30,000 of this in payment of its demand against the bank, transfer to the bank the Fleming and Templeton notes and indebtedness, with all collateral securing the same, and execute to the bank its own promissory note for the remaining \$35,000, with the cotton mill property as security. This was agreed to by the directors of the loan company, and the settlement was carried out accordingly. Shortly after this the present action was brought.

The "collateral security" above referred to appears to have consisted of certain shares of stock in a corporation known as the Fleming Ranch & Cattle Company, acquired in the winding-up of the bankrupt estate of Fleming. These shares, so far as the evidence showed, were the only thing of value recovered either by the loan company or by the bank from the estates of the borrowers. After the present suit was commenced, the Fleming Ranch & Cattle Company was liquidated, and in the distribution of its assets the bank received sums aggregating \$9,149.34, which are credited as payments on account of its claim against defendant.

[3] So far as the above-recited facts were in dispute, there was substantial evidence tending to support a view of them favorable to plaintiff's contentions. What weight should be given to it was for the jury, not the court, to determine. *Hepburn v. Dubois*, 12 Pet. 345, 376, 9 L. Ed. 1111; *Lancaster v. Collins*, 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373; *Chicago & Northwestern Ry. Co. v. Ohle*, 117 U. S. 123, 129, 6 Sup. Ct. 632, 29 L. Ed. 837; *Ætna Life Ins. Co. v. Ward*, 140 U. S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371; *Troxell v. Del., Lack. & Western R. R.*, 227 U. S. 434, 444, 33 Sup. Ct. 274, 57 L. Ed. 586.

We proceed to consider, in the order of

convenience, the questions raised upon the record.

[4] (1) And, first, as to the direction of a verdict in favor of defendant. Plaintiff, in

\*81

the amended petition upon which \*the case went to trial, after a circumstantial statement respecting the transaction of June 10, 1907, alleged that the discount of the notes—

“was an excessive loan, whether regarded as one loan to the firm of Fleming & Templeton, as plaintiff alleges the fact to be, or regarded as two loans, as contended for by the defendant in his pleadings heretofore filed herein.”

The designation of Fleming & Templeton, as a “firm” is but descriptive, and not essential, and the pleading is sufficient, if the proof tended to show a single and excessive loan made to them jointly in any capacity, or made in form one-half to each, but in substance as a single loan.

In our opinion, the trial judge clearly erred in holding, as in effect he must have held, that there was no substantial evidence from which the jury might find that there was an excessive loan, in the making of which defendant, as a director of the bank, knowingly participated. That he acted for the bank in the matter, and that he knew that any loan in excess of \$20,000 was prohibited, he admitted. His denial that it was a single loan, or that he knew it to be such, is not conclusive; there being substantial evidence inconsistent with it, tending to show facts and circumstances attendant upon the transaction, of which he had knowledge, and also subsequent conduct in the nature of admissions by him, inconsistent with his testimony upon this point. The account of the negotiations, as given in defendant's own testimony; the fact that he knew that the firm of Fleming & Templeton, even if dissolved, was still in liquidation; that one of the inducements for the loan (or “loans”) was the transfer of deposit accounts of equal or greater amount from the firm to the bank; that Templeton alone (as shown by the exhibits) appears to have corresponded with defendant concerning the notes; that defendant himself, as vice president of the bank, wrote to Templeton acknowledging receipt of the two notes

\*82

for \$15,000 each, “signed \*by yourself and Fred Fleming,” and, having “deducted the discount, \$900,” inclosed the bank's draft “order Fleming & Templeton for \$29,100”; that when the notes fell due in December the correspondence concerning their renewal was conducted by defendant with Templeton alone, and they were treated as representing a single loan, and the discount was charged by defendant or under his direction in a single item; that after the borrowers had become notoriously insolvent, in February, 1908, defendant took part in transferring the

notes “without recourse” to the affiliated loan company in the manner and under the circumstances above stated; that the transfer was effected a few days after the visit of the bank examiner; that when the Deputy Comptroller wrote to the bank, classifying “Fleming & Templeton \$30,000” as an excessive loan, and demanding that the directors responsible for making it should assume the loss, defendant joined in signing the reply that has been quoted—all this, to say nothing of other circumstances that might be mentioned, would have warranted the jury in finding, notwithstanding defendant's denial, that in fact the disputed transaction was a single loan of \$30,000, less discount, or, to be precise, \$29,100 made to Fleming and Templeton jointly; that defendant knew and assented to this at the time; and that the taking of two notes was but a device to conceal the true nature of the transaction.

[5] (2) Irrespective of whether there was but a single loan, or were two separate loans, plaintiff in error contends that the liability of a surety must be added to his direct and primary liability in determining his total liabilities for money borrowed within the meaning of section 5200, and that in the present case, although the notes should be found to have represented two entirely separate loans, each within the limit, they must be added together in order to determine whether the limit was exceeded. *Cochran v. United States*, 157 U. S. 286, 295, 296, 15 Sup. Ct. 628, 39 L. Ed. 704, is cited, where it

\*83

was held \*that the word “liabilities,” as employed in section 5211, R. S. (Comp. St. § 9774), included contingent liabilities. We do not regard the case as controlling, because the purpose of that section, and the language employed, differ materially from the purpose and the language of the provision we are dealing with. As to whether in section 5200 the words “the total liabilities \* \* \* of any person \* \* \* for money borrowed,” etc., require the liability of a surety or of an indorser for money borrowed by another to be added to his direct liability for money borrowed by himself in ascertaining whether the limit is exceeded—whatever view we might entertain, were the matter *res nova*—we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section; and we are not prepared to say that in an action against a director, who knows and relies upon the fact that a particular obligation is signed by one merely as surety, although not so described, the



defendant may not be permitted to show the truth.

[6, 7] (3) In view of certain contentions urged here in behalf of defendant, and perhaps acceded to by the courts below, it should be said that the question whether defendant knowingly participated in or assented to the making of a loan in excess of the limit prescribed by section 5200 is not to be confused by any consideration of the supposed standing of the borrowers, personal or financial. The statutory limit is a special safeguard prescribed by Congress for the very purpose (among others) of preventing undue reliance upon the financial standing of borrowers. Nor would the absence of any improper motive or a desire for personal profit on defend-

\*84

ant's part be a defense; nor the fact that \*in spite of a loss upon this transaction the bank remained solvent, or even prosperous. Neither is the question of defendant's liability, or the extent of it, to be affected by the fact, if it be a fact, that other officers or directors of the bank were in part responsible, yet defendant alone was sued; nor that the bank refrained from suing him until after a change in the stockholding interest or control. Again, in the absence of some special agreement—and none such appears—it is immaterial whether the new stockholders were aware of the excessive loan, or of defendant's alleged liability in the premises, at the time they acquired their stock, or whether they possibly may now profit by an increase in the value of the shares in the event of a recovery against him.

It is clear from the language of section 5239, Rev. Stat., that every director knowingly participating in or assenting to a violation of any of the provisions of the act is "liable in his personal and individual capacity," without regard to the question whether other directors likewise are liable. The violation is in the nature of a tort, and the party injured may sue one or several of the joint participants. *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 132, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875. And the liability extends to "all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." In the present action the bank represents the interest of its shareholders, as well as of its creditors; and if there was a violation of the act by defendant, with resulting diminution of its assets, the bank is entitled to recover the damages thus sustained, notwithstanding it remained solvent, and irrespective of any changes in its stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial. Even if it appeared that new stockholders acquired their interests with knowledge of the fact that such a loss had been sustained and that defendant was re-

\*85

sponsible for it, \*neither they nor the bank would be thereby estopped from having full recovery from defendant. There is no reason in the law to disentitle a purchaser of shares from even relying upon the responsibility of directors to make good previous losses as an element adding intrinsic value to the shares. Compare *Bigelow v. Old Dominion Copper Co.*, 74 N. J. Eq. 457, 500, 71 Atl. 153.

[8] (4) Defendant, among other defenses, pleaded the two-year statute of limitations of the state of Texas. Plaintiff demurred on the ground that this limitation was not a bar, and also replied, setting up certain facts that need not now be recited. The demurrer was overruled.

The provisions of the Texas statutes upon the subject are *Vernon's Sayles' Tex. Civ. Stat.* 1914, arts. 5687, 5688, and 5690, set forth in the margin.<sup>1</sup>

\*86

\*In our opinion, the action is not one of the kinds specified in article 5687, to which the two-year limitation applies, but is within the general description of article 5690, and sub-

<sup>1</sup> Art. 5687. There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such personal property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitations shall run against each item from the date of such delivery, unless otherwise specially contracted.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured.

Art. 5688. There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his copartner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

Art. 5690. Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.



ject only to the limitation of four years. Hence the limitation pleaded was no defense; and it is not contended that there was any basis in fact for pleading the four-year limitation.

[9] (5) Assuming the Fleming and Templeton notes were found to represent an excessive loan, knowingly participated in or assented to by defendant as a director of the bank, in our opinion the cause of action against him accrued on or about June 10, 1907, when the bank through his act parted with the money loaned, receiving in return only negotiable paper that it could not lawfully accept because the transaction was prohibited by section 5200, Rev. Stat. The damage as well as the injury was complete at that time, and the bank was not obliged to await the maturity of the notes, because immediately it became the duty of the officers or directors who knowingly participated in making the excessive loan to undo the wrong done by taking the notes off the hands of the bank and restoring to it the money that had

\*87

been loaned. Of \*course, whatever of value the bank recovered from the borrowers on account of the loan would go in diminution of the damages; but the responsible officials would have no right to require the bank to pursue its remedies against the borrowers or await the liquidation of their estates. The liability imposed by the statute upon the directors is a direct liability, not contingent or collateral.

[10] (6) The question is raised whether the entire sum loaned, plus interest and less salvage, should be treated as damages sustained by the bank through the violation of the provisions of section 5200, Rev. Stat.—assuming it be found that defendant did knowingly violate them—or whether only the excess above what lawfully might have been loaned (presumably \$20,000) should be so regarded. We assume that if, in good faith and in the ordinary course of business, defendant had made a loan of \$20,000 to Fleming and Templeton, and if while this loan remained unpaid he had afterwards and as a separate transaction unlawfully loaned them an additional \$10,000 in excess of the limit, the damage legally attributable to his violation of the limiting provision would have been but \$10,000. But that is not this case. According to the evidence, the \$30,000, less discount, was paid out by the bank as a single payment; and, if the jury found it to have been loaned in excess of the statutory limit (whether in form one loan or two), it must be upon the ground that it was a single transaction. That being so it would follow that the entire amount disbursed by the bank was disbursed in violation of the law. The cause of action against a director knowingly participating in or assenting to such excessive loan would be

complete at that moment, and entire; there would be no legal presumption that the borrowers would have accepted a loan within the limit, if their application for the excessive loan had been refused; nor that a director who in fact violated his duty as defined by law would, if mindful of it, have loaned them even \$20,000. To mitigate in his favor

\*88

the damages resulting from a breach of his statutory duty by resorting to the hypothesis that, if he had not disregarded the law in this respect, he would have pursued a different course of action within the law, would be an unwarranted resort to fiction in aid of a wrongdoer, and at the expense of the party injured. Hence the entire excessive loan would have to be regarded as the basis for computing the damages of the bank.

[11] (7) In behalf of defendant it is insisted that, assuming the loan was excessive, no loss accrued to the bank by reason of it, because the Fleming and Templeton notes and indebtedness were transferred to the loan company February 12, 1908, for a cash consideration equivalent to their face value, less interest to maturity.

Plaintiff in error contends that the bank and the loan company were so identical in ownership and united in management that the latter was but the alter ego of the former, and a loss to the loan company on the notes was the same as a loss to the bank, not only practically, but in contemplation of law. On the other hand, the argument of defendant in error regards the two corporations as if they were wholly independent, treats the transfer of the notes from the bank to the loan company, in February, 1908, as valid and the money or credit contemporaneously transferred to the bank like money coming from an outside party, and looks upon the re-transfer in January, 1910, as voluntary on the part of the bank, and an unnecessary assumption of loss that otherwise it had escaped.

We cannot accede to either contention in the extreme. Because the bank and the loan company were distinct legal organizations, operating under separate charters derived from different sources, and possessing independent powers and privileges, we are constrained to hold that, notwithstanding the identity of stock ownership and their close affiliation in management, for some purposes they must be regarded as separate corporations—

\*89

for \*instance, as being capable in law of contracting with each other. See *Nashua Railroad v. Lowell Railroad*, 136 U. S. 356, 372, 373, 375, et seq., 10 Sup. Ct. 1004, 34 L. Ed. 363. But in considering the practical effect of such intercorporate dealings, especially as bearing upon the duties of the common directors and the authority of the stockholders to control them, we need not and ought not to overlook the identity of stock ownership. Thus the transfer of the notes

In February, 1908, from the bank to the loan company, in consideration of their full face value ostensibly or actually paid by the company to the bank, evidently could have no effect in relieving the stockholding interest from loss, since each stockholder of one corporation had a corresponding interest in the stock of the other, and any theoretical saving that accrued to him as a stockholder of the bank was balanced by a corresponding loss sustained in his capacity as a stockholder of the company. At the same time the stockholders, in reviewing that transaction, might lawfully and properly base their action upon all the facts of the situation; recognizing the legal separateness of the corporations as existing in order to test the validity of the transfer and the feasibility of setting it aside without litigation, while giving effect to their community of interest in deciding whether this should be done, and, if so, then in what manner and upon what terms.

[12, 13] (8) Regarding the two corporations as legally separate, and ignoring for the moment the community of stockholding interest, it is plain that the transaction of February 12, 1908, in which the bank sold the Fleming and Templeton notes and indebtedness to the loan company for their full face value, was *prima facie* tantamount to a satisfaction of the damages that the bank had sustained by reason of the excessive loan, but that it had this effect only provided the transaction was good and valid as against the loan company and its stockholders, or was duly ratified by

\*90

them; for if it was invalid, or was made \*under circumstances rendering it voidable by the loan company, or the stockholders, neither the bank nor defendant was entitled to have the transaction stand for their benefit, and if in fact it was avoided for good cause, the bank would be entitled to its action against defendant, the same as if the annulled transaction never had occurred.

Was there good cause for the rescission? The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent, unless expressly authorized or ratified by the stockholders; and certainly, where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where, in addition to this, the personal interests of the directors, or any of them, would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud.

Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 589, 23 L. Ed. 328; Wardell v. Railroad Co., 103 U. S. 651, 657, et seq., 26 L. Ed. 509; Thomas v. Brownville, etc., Railroad Co., 109 U. S. 522, 524, 3 Sup. Ct. 315, 27 L. Ed. 1018; Richardson v. Green, 133 U. S. 30, 43, 10 Sup. Ct. 280, 33 L. Ed. 516; McGourkey v. Toledo & Ohio Ry., 146 U. S. 536, 552, 565, 13 Sup. Ct. 170, 36 L. Ed. 1079.

[14] The evidence having tended to show a transfer of the notes in question from the bank to the loan company "without recourse," for a consideration equivalent to their full face value, after the insolvency of the makers had been brought to light, with resulting discredit of the notes as marketable paper and probable inability of the makers to pay them, a transaction carried out by directors

\*91

and \*officers who acted as agents or trustees for both corporations, and one at least of whom, as the jury might find, was subject to criticism from the Comptroller of the Currency, and to an action at the suit of the bank, for making an excessive loan, it clearly was open to the jury to find that the transfer was fraudulent as against the loan company, and as against the stockholders of both companies. The jury should have been instructed to this effect, and, further, that if they found the transfer to have been fraudulent, the stockholders had the right to rescind it within a reasonable time after discovery of the fraud, and that if, having such right, the stockholders of the loan company asserted it and gave notice of its claim to the bank in the manner shown by the minutes, and the bank, recognizing and acknowledging the justness of the claim, restored to the loan company what was accepted as the equivalent in value of that which the bank had received in the transaction of February, 1908, this was not to be regarded as a voluntary or unnecessary assumption of loss by the bank, but on the contrary the result, so far as defendant was concerned, was the same as if by court decree, in a suit brought by the loan company, or by the stockholders, the bank had been compelled to make such restitution, and that thereafter the rescinded transaction could not be regarded as amounting, even in form of law, to a satisfaction of the damages sustained by the bank as a result of the Fleming and Templeton loan.

So far as the evidence showed, neither the stockholders of the loan company, nor indeed its board of directors, ever expressly ratified or affirmed the transfer. Nor does it appear that there was any unreasonable delay on the part of the stockholders in taking action to set it aside after they had become aware of the circumstances; such delay as there was the bank waived, as it had a right to do; and defendant does not appear to have changed his position, or to have been prejudiced, by reason of it.

\*92

[15] \*Assuming, in defendant's favor, that



because the corporations were legally separate they could not undo the transaction of February, 1908, without formal corporate action, the procedure adopted was sufficient for the purpose. It is objected that the personnel of the boards was changed for the very purpose of accomplishing the rescission, and that the new members were mere figure-heads or dummies for the controlling stockholders, and had no bona fide stock of their own. But if the transaction of 1908 was a fraud as against the loan company, and done without authority of the stockholders, they were quite within their rights in acting through dummies, if necessary, in order to set it aside. We do not think it was necessary to change the membership of the boards; similar action by boards having identical membership would have had the same effect, if done by the express authority of the stockholders in order to undo an improper and unlawful act of former directors injurious to their interests.

It is said that the rescission was put through in order to enable the bank to bring the present action against defendant. But it was not done to build up a ground of action against him, for this arose, if at all, prior to February 12, 1908; the damage to the bank being sustained when with his participation and assent its money was paid to Fleming and Templeton in June, 1907, for promissory notes that the bank could not lawfully take. Defendant's liability to the bank, if he was liable, was direct and primary, and to it the notes occupied the status of collateral security. Had the disposition made of them in February, 1908, been valid and unassailable, it would have borne the appearance of a satisfaction of the damages only because the two corporations were legally separate; but in substance, so far as the stockholders were concerned, it would have satisfied nothing, because it merely transferred money to them in one capacity by taking it from them in another. Defendant had no right to have the transaction remain

\*93

\*in effect as a screen to protect him from suit by the bank under section 5239, Rev. Stat. So far as it may be supposed to have protected him while it remained unrescinded, the result was entirely gratuitous; no consideration having proceeded from him in the matter. Indeed, if his act in shifting the discredited loan was done in part to give him immunity from such an action as the present, this would furnish an additional ground entitling the stockholders to set the transfer aside. And if, either on this ground or on the ground that the transfer was put through for the advantage of one corporation at the expense of the other, by officers or directors acting at the same time for both and without the authority of the stockholders, the transaction was voidable by the stockholders and they resolved to avoid it, it would savor of absurdity to sustain defendant's conten-

tion that this was done in order to enable the bank to sue him; for, of course, they would have the right to do it for that very purpose.

[16] (9) In defendant's behalf it is insisted that at the time of the proceedings of January, 1910, the value of the cotton mill property was much less than \$65,000, so that in the exchange made the bank in effect parted with little or no value for the return to it of the Fleming and Templeton notes and indebtedness. But for reasons already sufficiently indicated, we are of opinion that defendant is not entitled to raise an inquiry into the value of this property, as bearing either upon the question of the bank's right of action against him or upon the question of damages. If the loan company or the stockholders had good ground for rescinding the 1908 transaction, and this was done pursuant to their resolution, they might waive a return of the precise consideration and accept such equivalent in exchange as to them seemed proper. Because of the identity of the stockholding interest, the transaction, even while it stood, was, as we have shown, only a pseudo satis-

\*94

faction of the bank's loss in the Fleming and Templeton loan; and when the real parties affected by this loss undertook on just grounds to set aside the transfer of the notes, and took such proceedings through action of the two corporations as were necessary for that purpose, they had a right to recognize the community of interest in settling the terms upon which this should be done, and defendant has no standing to complain.

If there be a seeming inconsistency in sustaining a rescission of the 1908 transaction avowedly based upon the ground that the loan company had unjustly been subjected to a loss therein, while at the same time we treat as unimportant the question whether upon such rescission full restitution was made to that company, it should be said that we treat it as unimportant only so far as defendant is concerned, and, if there be inconsistency, it is no more than corrective of the unreality of the 1908 transaction itself. It is defendant who invokes that transaction as an actual realization by the bank of full value through a sale of the notes that it held as collateral security for its claim against him. If, regarding it as an actual sale, it was voidable, because done by agents acting at the same time in a dual capacity, or for other reasons, he cannot complain that the parties entitled to avoid it treated it as actual for the purpose of setting it aside, and in the consequent readjustment recognized a substantial identity of interest between seller and purchaser in the rescinded transaction that rendered it hardly an actual sale. For, to the extent that the sale was a sham, there was no realization by the bank upon the collateral security and hence no satisfaction of the damages claimed against him.

The judgment under review must be reversed, to the end that there may be a new



trial in accordance with the views above expressed.

Judgment reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

(251 U. S. 95)

WAGNER et al. v. CITY OF COVINGTON.

GILLIGAN v. SAME.

(Argued Nov. 10 & 11, 1919. Decided Dec. 8, 1919.)

Nos. 61, 62.

1. COMMERCE ⇐40(1) — INTERSTATE TRANSACTION NOT SUBJECT TO LICENSE BY CITY; "INTERSTATE COMMERCE."

With respect to goods occasionally carried on a wagon from proprietors of a bottling works in Ohio into Kentucky in response to orders previously received at the works in Ohio, the proprietors of the works are engaged in "interstate commerce," and not subject to the licensing power of any Kentucky municipality.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COURTS ⇐366(6)—DETERMINATION OF CONSTITUTIONALITY OF TAX BY FEDERAL COURT.

When the Supreme Court of the United States is called on to test a state tax by the provisions of the Constitution of the United States, its decision must depend, not on the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather on the practical operation and effect of the tax as applied and enforced. The state courts could not validate by misdescription a tax law repugnant in substance to the federal Constitution, nor render invalid a tax actually valid merely by inaccurately defining it.

3. COMMERCE ⇐64—TAX ON ITINERANT SALES NOT VIOLATIVE OF COMMERCE CLAUSE.

License regulation or tax of the state of Kentucky, imposed through a city on the business of wholesale dealer in soft drink goods, *held* not a regulation of or direct burden on interstate commerce, to invalidate it under the commerce clause of the federal Constitution (article 1, § 8), when enforced impartially with respect to goods manufactured without as well as within the state, and brought into the state for sale from a wagon.

Mr. Justice McKenna and Mr. Justice Holmes, dissenting.

In Error to the Court of Appeals of the State of Kentucky.

Action by William T. Wagner and others, partners, doing business under the firm name of W. T. Wagner's Sons, against the City of Covington. From a judgment for defendant, plaintiffs appealed to the Court of Appeals of Kentucky, which affirmed (177 Ky. 385, 197 S. W. 806), and plaintiffs bring error. Affirmed.

Messrs. Harry Brent Mackoy and W. H. Mackoy, both of Cincinnati, Ohio, for plaintiffs in error.

Mr. A. E. Stricklett, of Covington, Ky., for defendant in error.

\*98

\*Mr. Justice PITNEY delivered the opinion of the Court.

This was an action brought by plaintiffs in error in a state court of Kentucky against

\*99

the city of Covington, a \*municipal corporation of that state, to recover license fees theretofore paid by them under certain ordinances of the city for the conduct of their business in Covington, and to enjoin the enforcement against them of a later ordinance calling for further like payments. The several ordinances, each in its turn, required all persons carrying on certain specified businesses in the city to take out licenses and pay license fees; among others, the business of wholesale dealer in what are known as "soft drinks." Plaintiffs were and are manufacturers of such drinks, having their factory and bottling works in the city of Cincinnati, in the state of Ohio, on the opposite side of the Ohio river from Covington. They have carried on and do carry on the business of selling in Covington soft drinks, the product of their manufacture, in the following manner: They have a list of retail dealers in Covington to whom they have been and are in the habit of making sales. Two or three times a week a wagon or other vehicle owned by plaintiffs is loaded at the factory in Cincinnati and sent across the river to Covington, and calls upon the retail dealers mentioned, many of whom have been for years on plaintiffs' list and have purchased their goods under a general understanding that plaintiffs' vehicle would call occasionally and furnish them with such soft drinks as they might need or desire to purchase from plaintiffs. When a customer's place of business is reached by the vehicle the driver goes into the storeroom and either asks or looks to see what amount of drinks is needed or wanted. He then goes out to the vehicle and brings from it the necessary quantity, which he carries into the store and delivers to the customer. Upon his trips to Covington he always carries sufficient drinks to meet the probable demands of the customers, based on past experience; but, with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiff's place

\*100

of business in Cincinnati, all \*sales in Covington are made from the vehicle by the driver in the manner mentioned. Sometimes the driver succeeds in selling there the entire supply thus carried upon the wagon; sometimes only a part thereof; or he may return after having made but a few sales, or none at all, in which event he carries the unsold

supply back to plaintiffs' place of business in Cincinnati. The soft drinks in question are delivered in stopped bottles or siphons, according to their nature, and these are placed (at the bottling works) in separate wooden or metal cases, each case being open at the top and holding a certain number of bottles or siphons, according to the nature of the drinks and the custom of the trade. The filled bottles or siphons are carried upon the vehicle, sold, and delivered in these cases; each case remaining entire and unbroken, and nothing less than a case being sold or delivered. The retail dealers usually pay cash, and purchase only the contents of the bottles, while the bottles and cases remain the property of plaintiffs and are subsequently collected, when empty, by plaintiffs' drivers or agents on their regular visits. There are, however, a few customers who pay for and thereafter own the bottles in which distilled water is delivered. The ordinances were and are respectively applicable to all wholesale dealers in such soft drinks in Covington, whether the goods were or are manufactured within or without the state.

The trial court, and on appeal, the Court of Appeals of Kentucky, gave judgment for defendant, overruling the contention of plaintiffs that the ordinances as carried into effect against them were repugnant to the "commerce clause" (article 1, § 8) of the Constitution of the United States (177 Ky. 385, 197 S. W. 806), and upon this federal question the case is brought here by writ of error.

[1] It is important to observe the precise point that we have to determine. It is indisputable that with respect to the goods occasionally carried upon plaintiff's wagon

\*101

from one \*state to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality. The Court of Appeals in the present case, in line with its previous decisions in *City of Newport v. Wagner*, 168 Ky. 641, 646, 182 S. W. 834, Ann. Cas. 1917A, 962, and *City of Newport v. French Brothers Bauer Co.*, 169 Ky. 174, 183 S. W. 532, recognizing the authority of the decisions of this court bearing upon the subject, conceded that this part of plaintiffs' business was not subject to state regulation. 177 Ky. 388, 197 S. W. 806. At the same time the court held that with respect to the remaining and principal part of the business conducted in Covington, that which consists in carrying a supply of goods from place to place upon wagons, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold, plaintiffs were subject to the licensing ordinances; and it is with this alone that we have to deal. If, with respect to this portion of their business, plaintiffs may be subjected

to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state, might be repugnant to the federal Constitution.

[2] From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vender or peddler; a traveling from place to place within the state, selling goods that are carried about with the seller for the purpose. Plaintiffs in error insist that this view of the matter is untenable, because the courts of Kentucky have held that sales made to a retail merchant for resale do not constitute peddling within the meaning of the statutes of that state. *Standard Oil Co. v. Commonwealth*, 107 Ky. 606, 609, 55 S. W. 8; *City of New-*

\*102

*port v. French Brothers Bauer Co.*, 169 \*Ky. 174, 185, 183 S. W. 532. These decisions, however, deal merely with a question of statutory definition; and it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it. *St. Louis Southwestern Ry. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265.

[3] We have then, a state tax upon the business of an itinerant vender of goods as carried on within the state, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce clause." *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Baccus v. Louisiana*, 232 U. S. 334, 34 Sup. Ct. 439, 58 L. Ed. 627.

The peddler's license tax considered in *Welton v. State of Missouri*, 91 U. S. 275, 23

(40 Sup.Ct.)

L. Ed. 347, was denounced only because it amounted to a discrimination against the products of other states, and therefore to an interference with commerce among the states. To the same effect, *Walling v. Michigan*, 116 U. S. 446, 454, 6 Sup. Ct. 454, 29 L. Ed. 691.

## \*103

\*Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.

The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce has always been recognized. In *Robbins v. Shelby Taxing District*, 120 U. S. 489, at page 497, 7 Sup. Ct. 592, 596 (30 L. Ed. 694), Mr. Justice Bradley, who spoke for the court, said:

"When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. *Brown v. Houston*, 114 U. S. 622 [5 Sup. Ct. 1091, 29 L. Ed. 257]; *Machine Co. v. Gage*, 100

U. S. 676 [25 L. Ed. 754]. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce."

See, also, *Crenshaw v. Arkansas*, 227 U. S. 389, 399, 400, 33 Sup. Ct. 294, 57 L. Ed. 565, where the distinction was clearly set forth. And in all the "drummer cases" the fact has appeared that there was no selling from a stock of goods carried for the purpose but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the state. *Rogers v. Arkansas*, 227 U. S. 401.

## \*104

408, 33 Sup. Ct. 298, 57 L. Ed. 569; \**Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Rearick v. Pennsylvania*, 203 U. S. 507, 510, 27 Sup. Ct. 159, 51 L. Ed. 295; *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264; *Browning v. Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828; *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 153, 38 Sup. Ct. 295, 62 L. Ed. 632.

Judgment affirmed.

(251 U. S. 104)

No. 62. *Gilligan v. City of Covington*. By stipulation of counsel this case was heard with No. 61, and it is agreed that a similar judgment is to be entered.

Judgment affirmed.

Mr. Justice McKENNA and Mr. Justice HOLMES dissent.



(251 U. S. 134)

**BONE v. COMMISSIONERS OF MARION COUNTY.**

(Argued Nov. 11, 1919. Decided Dec. 15, 1919.)

No. 63.

**PATENTS** ¶328—FOR RETAINING WALL CONTAINING NO NOVELTY AND NOT INFRINGED.

The Bone patent, No. 705,732, for a retaining wall of reinforced concrete, with a heel such that the weight of the earth thereon tends to keep the wall erect, *held*, under Rev. St. § 4866, in view of prior patents and description of the device in foreign printed publications, to contain no patentable novelty, except, perhaps, in its special form, and in that respect not infringed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by Frank A. Bone against the Commissioners of Marion County. Decree for defendants was affirmed by the Circuit Court of Appeals (249 Fed. 211, 161 C. C. A. 247), and complainant brings certiorari. Affirmed.

\*135

\*Messrs. Clarence E. Mehlhope, of Chicago, Ill., and Arthur H. Ewald, of Cincinnati, Ohio, for petitioner.

Mr. V. H. Lockwood, of Indianapolis, Ind., for respondents.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit brought in the District Court of the United States for the District of Indiana to restrain the infringement of a patent for a retaining wall, which, to quote petitioner, is "a wall to prevent the material of an embankment or cut from sliding."

After issue joined and proofs submitted, the District Court (Anderson, J.) entered a decree dismissing the bill for want of equity. The decree was affirmed by the Circuit Court of Appeals, to review which action this writ of certiorari was granted.

The bill in the case is in the conventional form and alleges invention, the issue of a patent numbered 705,732, and infringement by respondent. The prayer is for treble damages, an injunction, and accounting.

The answer of respondent is a serial denial of the allegations of the bill and avers anticipation of petitioner's device by prior patents and publications, in this and other countries.

This summary of the issues is enough for our purpose and we need only add preliminarily to their discussion that Bone's device has the sanction of a patent and a decision sustaining it by the District Court for the Northern District of Ohio and the Circuit

\*136

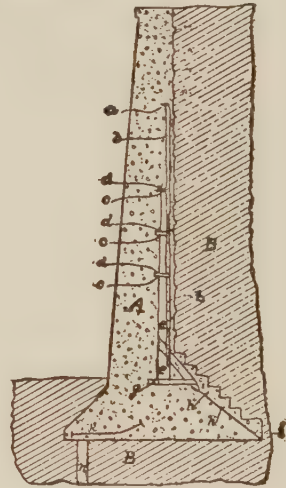
Court of Appeals for the Sixth Circuit. The difference of decision in that circuit and the Seventh circuit is an important consideration

and must be accounted for, which is best done by a display of the patent and the case.

First, as to the patent: It describes the invention as being one that—

"relates to improvements in retaining walls for abutments to bridges, \* \* \* and such places as it is desired to retain earth or other matter permanently in place with its face at an angle nearer vertical than it would naturally repose when exposed to the action of the elements or gravity," and "consists principally of introducing into masonry of concrete, stone or brick a framework of steel or iron in such way that the whole wall is so much strengthened thereby that the volume of the masonry may be greatly reduced, and yet the height, base, and strength against overturning, bulging, or settling will still be ample."

The following figure represents a cross-sectional view of the device—A representing the masonry, B the material retained, and B' the earth on which the wall rests. The metal parts within A are indicated by the smaller letters.



\*137

\*The patent does not insist upon that form of the masonry in all particulars. The base of the wall may be, it is said, "varied to suit the circumstances"; it (the base) may extend to the rear rather than the front "with proper proportions of metal \* \* \* the form shown in the drawings being what might be called an inverted T, while those suggested would be in the form of an L or reversed L."

The utility of the wall of these shapes is represented to be that it is "not so liable to be overturned from the pressure of material behind it as would be a wall of the same height and area of section but having a rectangular, trapezoidal or triangular shaped section," the latter shapes requiring more masonry. And it is said that the patented wall, "having more base and less weight" than such other shapes, "will rest more se-

curely on a soft or yielding foundation, the weight of the material resting on the heel" causing the latter "to press on the earth below, and thus cause friction to prevent the whole wall from sliding outward." This is the especial effect of the patent, achieved by the wall of the shape described, and distinguishes it, is the contention, from the retaining walls of the prior art.

The patentee admits, however, that retaining walls had been "constructed of concrete and steel, but none" to his "knowledge" "had been supported on their own base as" his, nor had "any of them entirely inclosed the steel within the concrete," nor had "any of them used the weight of the material retained as a force to retain itself."

Such, then, is the wall and the utility attributed to it. The combinations which may be made with it are set forth in 17 claims, of which 1, 3, 5, 16, and 17 are involved in the present action. Counsel for petitioner considers, however, that 1 and 17 are so far illustrative that the others need not be given. They are as follows:

"1. The combination with a retaining wall

\*138

having a \*heel, of a metal structure embedded vertically in said wall and obliquely in said heel, so that the weight of the retained material upon the heel of the metal structure will operate to retain the wall in vertical position."

"17. The combination with a retaining wall having an inclined heel and a toe at opposite sides thereof, of a metal structure embedded within said wall and heel, said structure consisting of upright bents at the back part of the vertical wall and continuing down along the upper part of the heel of said wall to the back part thereof, whereby by reason of the toe and the heel the weight of the retained material upon the heel of the metal structure will operate to maintain the wall in a vertical position."

So much for the device of the patent. How far was it new or how far was it anticipated?

Bone's idea was conceived in 1898, and his patent issued in 1902, upon an application made in 1899, but according to his counsel the value of the invention was not recognized "until after the lapse of several years," when he, Bone, brought a suit against the city of Akron, Ohio, in the District Court for the Northern District of Ohio, in vindication of the patent and in reparation for its infringement. He was given a decree which was affirmed by the Circuit Court of Appeals for the Sixth Circuit. 221 Fed. 944, 137 C. C. A. 514.

The District Court (Judge Day) gave a clear exposition of the patent, the relation of

\*139

its metal parts<sup>1</sup> to the masonry parts and

<sup>1</sup> The following is an extract from Judge Day's opinion:

"The reinforcing members [metallic members] are placed near the back face of the wall and heel and near the lower face of the toe. The oblique reinforcing bars in the heel acting in conjunction with

their co-operating functions, and adjudged the patent valid and the wall of the city of Akron an infringement of it.

The Circuit Court of Appeals affirmed the decree. The court said that the record disclosed nothing which anticipated "the substantial thought of the patent." If it had done so, or, to quote the exact language of the court:

"If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures." <sup>2</sup>

\*140

\*On application for rehearing the court refused to direct the District Court to open the case to permit the defendant to put in proof regarding a German publication of 1894.

Those decisions confronted the District Court in the present suit and fortified the pretensions of the patent. They were at-

the uprights serve the function of a cantilever beam whereby the weight of the material pressing upon the heel is transferred to the upright portion of the wall and operates to retain the wall in a vertical position. \* \* \*

"Considering the claims of the patent, and the testimony, I am of the opinion that Bone, the patentee, was the first to reinforce the retaining wall, or similar wall of concrete or masonry in such a manner that the weight of the retained material would be utilized to impart through the reinforcing members tensile resistance to the stern or vertical part of the wall, thereby fortifying this part of the wall against breaking strains.

"This was an advancement in the art and possessed novelty and the structure of the defendant city infringed this patent.

"While many of the features of concrete structures were old, yet this combination as outlined and described in this Bone application for a patent, was new. It is also in evidence that there has been a large sale and general acquiescence in the Bone patent."

<sup>2</sup> The following is an extract from the opinion of the Circuit Court of Appeals:

"The record discloses nothing anticipating the substantial thought of the patent. Masonry or concrete retaining walls were deep and heavy, and maintained by gravity in their resistance against a horizontal stress. There was no occasion for reinforcement. Sustaining walls had been built of concrete with vertical reinforcement; but they were maintained against side strain by cross-ties or beams, without which they might tip over. If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures. Those which have that shape are sustaining walls only, and were so obviously unfit for use as retaining walls that no one seems to have seen the utility for that purpose, of which the form, when properly adapted and strengthened, was capable. There is also a prior wall, wholly of metal, fairly disclosing a unitary heel adapted to hold the wall erect; but to see that this could become merely a skeleton imbedded in concrete may well have required, in 1898, more than ordinary vision. Upon the whole, we think invention was involved, and the claims are valid."



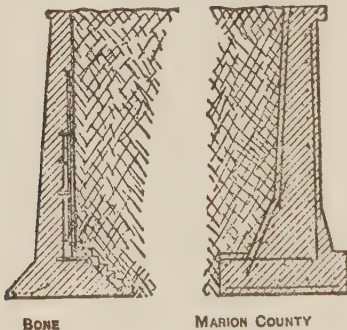
tacked, however, as having been pronounced upon a different record and this conclusion was accepted by the District Court. The latter court found from the new evidence the existence of a structure upon the nonexistence of which the Circuit Court of Appeals for the Sixth Circuit based its conclusion. The District Court said that Bone was not the first to do the things he asserted he was the first to do, and that whatever the record in the Sixth Circuit might have shown, so far as the record before the court "was concerned, the absolute converse of that proposition" had "been demonstrated."

The court, therefore, as we have said, dismissed the bill for want of equity.

The decree was affirmed by the Circuit Court of Appeals; indeed, the reasoning of the District Court was approved after painstaking consideration of the patent and an estimate of the anticipatory defenses; none of which the court said was introduced in the Akron Case, "otherwise a different conclusion would have been reached," adducing the opinion of the court. 249 Fed. 214, 161 C. C. A. 247. This being so, and there is no doubt it is so, the present case is relieved of the authority or persuasion of the Akron Case and it becomes necessary to consider the prior art and decide the extent and effect of its anticipation.

We have given a cross-section of the device

of the \*patent, showing its shape and strengthening "metallic members," and the patent informs of their co-operative function. We reproduce the device and set by its side the Marion county wall for comparison.



If we may assign novelty to the Bone wall and consider it a broad advance upon the prior art [the extent of its advance, if any, we shall consider later], we may assign infringement of it by the Marion county wall. To an examination of the prior art we are therefore brought.

It would be difficult to add anything to the consideration and comment of the Court of Appeals. The court cited in support of its judgment a patent issued to Francois Coignet in 1869, and one issued to Stowell & Cunningham in 1899 upon an application made in 1897, and to articles written by P.

Planat which appeared in 1894 and 1896 in a scientific magazine called "La Construction Moderne," published in Paris; also a publication which appeared in Germany in 1894 concerning a wall which is given the name of Bauzeitung wall. The article recites that a "utility model patent" had been granted, consisting "of a vertical and a horizontal member."

The Coignet patent is somewhat indefinite. It relates, according to its declaration, to "monolithic structures, or articles made of artificial stone paste" into which irregular shaped irons are introduced to be "arranged

in such a \*manner as to interlace each other, so that by the combination of this metallic skeleton and of agglomerated artificial stone paste the thickness of the walls or size of the articles may be considerably reduced and yet great strength be attained."

It will be observed that there is nothing explicit of how "stone paste" and the "irregular shaped irons" operate or co-operate, aside from their cohesion or interlacing. Their arrangement is not definite as the "metallic members" in the Bone patent are, so that there might be as in that patent, reinforcing metal in the heel of the wall acting with its upright portion serving the function, to quote Judge Day, "of a cantilever beam whereby the weight of the material pressing upon the heel is transferred to the upright of the wall and operates to retain the wall in a vertical position."

If there was any prophecy (to borrow counsel's word) in it the world was slow to discern it, and we are not disposed to give much anticipating effect to it, a view in which we have confirmation in the disclaimer of Bone—he conceding he was not the first to discover the art of reinforcing concrete.

The Planat publications are more explicit. We there see a relation between the metallic and masonry parts of a wall and their co-operation to produce strength in the wall and resistance to the pressure of and bulging from the stress of earth behind it. Both articles the Court of Appeals said, "deal with retaining walls of reinforced concrete of the cantilever type" and quoted from the article of 1896 as follows:

"These computations suppose that one has effectively realized the fixing of the vertical wall to the horizontal slab at their junction. This fixing requires special precautions. The bars at the point of junction exert a pulling force which tends to pull them out of the concrete. \* \* \* But here we have only a half beam on a cantilever span. It is necessary

that the extremities of the bars in the \*region of fixation should be held in a sufficient mass of concrete or maintained by some other means.

"One is able to reduce these projections in a very large measure, if one takes care to bind together the vertical bars and the horizontal bars at their point of intersection. In this way the pull of the bar is carried, not only on its prolongation, arranged for anchorage, but



also on the bar which is perpendicular to it, and whose great length permits it to offer a large resistance to the force tending to pull it out transversely."

The court did not enlarge upon other examples of the prior art nor do we think that it is necessary to do so. The court, however, referred to a publication in *Bauzeitung* and the patent to Stowell & Cunningham. The former is too technical to quote and the latter has not the simplicity of the Bone device; but both publication and patent represent structures that resist a tendency to tilting or bulging from the pressure of the earth in their rears. The *Bauzeitung* article did this by a wall which consisted of a "vertical and a horizontal member" which were "rigidly connected with each other" and—

"the ratios so chosen that the resultant of the earth thrust passes through the horizontal part or through the foundation respectively, so that there exists no longer any tendency to tilting so long as the two parts continue to be firmly connected with each other."

It is further said:

"To increase the stability, the horizontal part is furthermore connected at its rear end by means of anchors with the underground."

It will be observed, therefore, that there are no metallic reinforcing members. It is the shape of the wall—one having a base extending to the rear in the form of an L, the exact antecedent of one of the shapes described by Bone as having advantage over other shapes. And there was also the suggestion of the value of a firm connection between the "vertical and horizontal member." In other words, the publication showed a retain-

\*144  
ing \*wall having a heel such that the weight of the earth thereon would tend to keep the wall erect, an effect and operation that Bone declares in his patent no wall had attained prior to his invention. And that effect and operation the Circuit Court of Appeals for the Sixth Circuit considered the essence of the Bone patent, and the court said that—

"It might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength."

The Stowell & Cunningham structure is, as we have said, somewhat complex in its mechanical parts. But these are but details; the physical laws that they are to avail of are explained so that "the volume of masonry" of retaining walls may be reduced yet retain their strength by the use of metallic reinforcements.

Counsel attacks the sufficiency of the asserted anticipations, especially the publications, and in effect says that whatever conceptions lurked in them conveyed no suggestion of a "concrete entity," to use counsel's

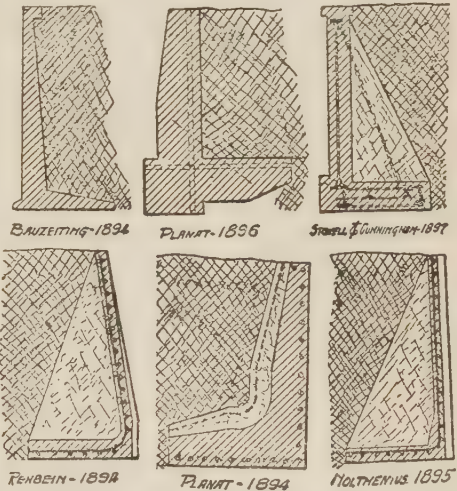
words, to execute them and laments that Bone should be robbed of the credit and reward of adding to the world's useful instrumentalities which, but for him, would have remained in theories and the "dust from which respondent recovered them."

To execute theories by adequate instrumentalities may indeed be invention, but an answer to petitioner's contention we have given by our comment on the *Bauzeitung* and Planat publications and the fullness of their expositions. Bone may have been ignorant of them and his device may not have been their suggestion. They seem to have been unknown to American engineers, not even the interest of the controversy in the Sixth Circuit having developed their existence. From this local ignorance nothing can be deduced favorable to the patent. Its device having been described in printed publications, although in foreign countries, patentable novelty or originality cannot be asserted for it. Section 4886, R. S.; 29 Stat. 692, c. 391

\*145

(Comp. St. § 9430). \*Such is the provision of the law and we cannot relax it in indulgence to what may seem the individual's merit.

The Circuit Court of Appeals, to show the progress of the prior art, made use of the illustrations of the patents and publications



that preceded Bone's, and we also avail ourselves of the same to show that Bone's patent was a step, not a leap, in that progress, and that the only originality that can be accorded it is in its special form and there can be no infringement except by a copy of that form or a colorable imitation of it. We do not think the Marion county wall is subject to either accusation and the decree of the Circuit Court of Appeals is

Affirmed.

Mr. Justice DAY took no part in the consideration or decision.

(251 U. S. 128)

UNITED STATES v. BOARD OF COM'RS  
OF OSAGE COUNTY, OKL., et al.(Argued April 16, 1919. Decided Dec. 15,  
1919.)

No. 309.

1. INDIANS ⇐6—POWER OF PROTECTION BY  
UNITED STATES NOT EXHAUSTED.

By Act June 28, 1906, as to distribution of the land and funds of the Osage Tribe of Indians, the United States did not exhaust its power as the protector and guardian of such Indians, and so leave it no longer any mission or authority as to them in such respect.

2. INDIANS ⇐27(1) — PROTECTION BY OFFI-  
CERS OF UNITED STATES AGAINST WRONGFUL  
TAXATION.

That Act June 28, 1906, as to distribution of the land of the Osage Indians, subjected the surplus land to taxation, does not prevent officers of the United States acting in its name to prevent the systematic violation of the state tax law, committed for purpose of destroying the rights of the Indians created by the act of Congress.

3. INDIANS ⇐27(1)—PROTECTION BY OFFI-  
CERS OF UNITED STATES AGAINST WRONGFUL  
TAXATION.

As the United States, as guardian of the Indians, has the duty to protect them from spoliation, and therefore right to prevent them being illegally deprived by excessive taxation of the rights conferred by Act June 28, 1906, as to distribution of lands of the Osage Indians, officers of the United States can invoke relief for the accomplishment of that purpose.

4. INDIANS ⇐27(1)—MULTIPLICITY OF SUITS  
AS GROUND FOR ENJOINING WRONGFUL TAXA-  
TION.

Notwithstanding the remedies afforded individuals by state law for correction of tax assessments, equity will, to prevent a multiplicity of suits, entertain a suit by the United States on behalf of numerous Indians to prevent enforcement of excessive taxes.

5. INDIANS ⇐27(1)—ENJOINING WRONGFUL  
TAXATION TO AFFORD ADEQUATE REMEDY.

The wrong relied on not being a mere mistake or error in the enforcement of state tax laws, but a systematic and intentional disregard of such laws by state officers, to destroy the rights of the whole class of noncompetent Indians, subject to the protection of the United States, there is a right to invoke the interposition of equity, that an adequate remedy may be afforded.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against the Board of County Commissioners of Osage County, Oklahoma. Decree dismissing the bill was affirmed by the Circuit Court of Appeals (254 Fed. 570, 166 C. O. A. 128), and complainant appeals. Reversed and remanded.

The Attorney General and Mr. Leslie C. Garnett, of Mathews, Va., for the United States.

Messrs. Preston A. Shinn and Corbett Corbett, both of Pawhuska, Okl., for appellees.

\*129

\*Mr. Chief Justice WHITE delivered the opinion of the Court.

Although the subject was fully stated in *McCurdy v. United States*, 246 U. S. 263, 33 Sup. Ct. 289, 62 L. Ed. 706, nevertheless, to throw light on this case, we recall the facts concerning the distribution of the land and funds of the Osage Tribe of Indians made under the Act of Congress of June 28, 1906, c. 3572, 34 Stat. 539.

Of the tribal land there were reserved from allotment certain parcels, some of which were used by the United States or the tribe and others of which were used by individuals for the benefit of the tribe. From the remainder, each member was allotted three tracts of 160 acres each, of which one was to be designated and held as a homestead. Any land which remained was also to be allotted. The funds in trust in the hands of the United States were divided pro rata, to be held subject to the supervision of the United States. The oil, gas, coal, and other mineral rights in all the lands were reserved for the benefit of the tribe. The tract selected as a homestead was made inalienable and nontaxable, subject to the action of Congress. The land embraced by other than the homestead allotment, called surplus land, was made inalienable for a period of 25 years and nontaxable for 3, subject to the action of Congress. Power was conferred, however, on the Secretary of the Interior to give to the allottee a certificate of competency, upon receipt of which the surplus land held by such an allottee become immediately alienable and taxable.

In September, 1917, the United States District Attorney for the District of Oklahoma, by direction of the Attorney General, commenced this suit in the name of the United States, for the benefit of named noncompetent members of the Osage Tribe and of all

\*130

other mem\*bers in the same situation, to prevent the enforcement of state and local taxes assessed against the surplus, although taxable, lands of said Indians for the 8 years between 1910 and 1917 inclusive.

The defendants were the board of county commissioners of Osage county, including the county clerk and county treasurer, officials charged by the laws of the state with the enforcement of the taxes which were assailed. After averring the existence of authority in the United States, in virtue of its guardianship of the Indians and as a result of the terms of the allotment act, to protect and safeguard the interests of the Indians from the enforcement of the illegal taxes com-



plained of, the bill charged that the taxes in issue were—

"arbitrary, grossly excessive, discriminatory and unfair, and were made in violation of the rights of the said Osage Indians guaranteed by the Constitution of the United States and the Constitution of the state of Oklahoma; \* \* \* that the state board of equalization arbitrarily and systematically increased the assessments on such Indian lands for the year 1911 to an amount approximately nearly double the original amount of such assessments. \* \* \*

It was averred that the tax assessments made on the Indian lands involved—

"were made without an inspection or examination of the land; \* \* \* that the said appraisers in making such appraisements discriminated against the lands of the Osage Indians as a class and systematically overvalued the same and systematically undervalued other property in said county; \* \* \* that the assessments so made by said assessors were made in such an arbitrary and capricious manner as to amount to constructive fraud upon the taxpayers; and that the overvaluations made by said assessors were so grossly excessive as to justify the interference of a court of equity. \* \* \*

It was alleged that the assessments complained of were of such a character that

\*131  
the \*Secretary of the Interior had endeavored to have them corrected, but without result; that, in consequence of his having called the attention of Congress to the subject, the Act of March 2, 1917, c. 146, § 17, 39 Stat. 983 (Comp. St. 1918, § 4137a), was passed authorizing an appraisal by the said Secretary for the purpose of fixing the extent of the overassessment and that such appraisal, which had been virtually completed, sustained the charges set forth in the bill.

There was annexed to the bill a statement of the result of the appraisal in 36 cases as compared with the assessments complained of. In one case it was alleged that the land of the Indian was assessed at \$20 an acre, although by the affidavit of the county clerk it was shown that it was worth \$3 per acre. In another case it was alleged that, for the purpose of taxation, the land was shown to be overvalued by 119 per cent. It was further averred that an offer had been made through the Secretary of the Interior to pay all the taxes assessed for all the years assailed upon the basis of the assessment made as the result of the act of Congress, but that the same had been refused, and that process for the sale of the lands for delinquent taxes was immediately threatened. The prayer was for relief by injunction as against the illegal assessments and for action by the court looking to a payment of all delinquent taxes due by noncompetent Osage Indians on the basis of the appraisal made under the act of Congress.

[1, 2] On motion the court dismissed the bill on the ground—

"that the lands involved were by the act of Congress, approved June 28, 1906, declared subject to taxation, and that the plaintiff has no interest in said lands, and has no duty or authority to contest the taxes thereof, or the sale of said lands for unpaid taxes. \* \* \*

On appeal the decree was affirmed on the ground that as the state law afforded adequate means to the United States and the noncompetent Indians to correct errors in assessing \*taxes, if any, there was no basis for invoking relief from a court of equity.

\*132  
The argument here is exclusively directed to two grounds, the one enforced by the trial court and the other sustained by the court below. The first, however, is in argument here expanded into two points of view, since it challenges not only the authority of the officers of the United States to bring the suit, but the power of the United States to authorize them to do it. So far as the latter aspect is concerned, it proceeds upon the assumption that by the act of 1906 the United States exhausted its power as the protector and guardian of the Osage Indians and as to them had no longer any mission or authority whatever. We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning and so in conflict with the terms of the act of Congress that nothing more need be said concerning it. As to the first point of view, the proposition is this: That as the act of 1906 subjected the surplus lands to taxation, it therefore brought them under the taxing laws of the state, and, it is insisted, that having been so brought, it results that until Congress otherwise provides there exists no lawful authority in an officer of the United States to act in the name of the United States for the purpose of attacking the legality of a tax levied upon said lands under the laws of the state. But although the premise upon which the argument proceeds be admitted, that is, that in subjecting the lands to state taxation it was the purpose of Congress to subject them to the methods of levying and collecting the taxes provided by state law, including the remedial processes for the correction of errors, we fail to understand what relation that concession can have to the case in hand, since on the face of the pleadings the action taken by the United States was not to frustrate the act of Congress by preventing the operation

\*133  
of the state \*law, but to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the act of Congress. The argument therefore disregards the foundation for the relief sought and the proceeds upon the assumption that the exertion of power to prevent a perversion of state laws made to defeat the rights which the act of Congress



gave is to be treated as a violation of the act of Congress and a refusal to apply the state law.

[3] Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed the act of Congress of 1917, providing for the appraisal of the lands in question, by necessary implication, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted.

[4, 5] And the existence of power in the United States to sue which is thus established disposes of the proposition that because of remedies afforded to individuals under the state law the authority of a court of equity could not be invoked by the United States. This necessarily follows because, in the first place, as the authority of the United States extended to all the noncompetent members of the tribe it obviously resulted that the interposition of a court of equity to prevent the wrong complained of was essential in order to avoid a multiplicity of suits (see *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; *Smyth v. Ames*, 169 U. S. 466, 517, 18 Sup. Ct. 418, 42 L. Ed. 819; *Cruikshank v. Bidwell*, 176 U. S. 73, 81, 20 Sup. Ct. 280, 44 L. Ed. 377; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 283, 29 Sup. Ct. 426, 53 L. Ed. 796; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88); in the second place because, as the wrong relied upon was not a

\*134

mere mistake or error \*committed in the enforcement of the state tax laws, but a systematic and intentional disregard of such laws by the state officers for the purpose of destroying the rights of the whole class of non-competent Indians who were subject to the protection of the United States, it follows that such class wrong and disregard of the state statute gave rise to the right to invoke the interposition of a court of equity in order that an adequate remedy might be afforded (*Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Pittsburgh, etc., R. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Coulter v. Louisville & Nashville R. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 507, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88). In fact the subject is fully covered by the

ruling in *Union Pacific Railway Co. v. Weld County*, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110.

Reversed and remanded for further proceedings in conformity with this opinion.

(251 U. S. 169)

# SULLIVAN v. CITY OF SHREVEPORT.

(Submitted Nov. 17, 1919. Decided Dec. 15, 1919.)

No. 89.

STREET RAILROADS ⚡72—ORDINANCE REQUIRING CONDUCTOR AND MOTORMAN TO OPERATE CARS VALID.

An ordinance requiring every street car to be operated by a conductor and motorman, subject to penalty for violation, is presumed a lawful exercise of the police powers for public safety, and, notwithstanding a contested claim of safety of a one-man car, cannot be held unconstitutional, in the absence of a showing of a clear case of arbitrary conduct on the part of the local authorities.

In Error to the Supreme Court of the State of Louisiana.

W. A. Sullivan was prosecuted by the City of Shreveport for violation of an ordinance. Judgment of conviction was affirmed by the Supreme Court of Louisiana (142 La. 573, 77 South. 286), and defendant brings error. Affirmed.

Mr. E. H. Randolph, of Shreveport, La., for plaintiff in error.

Mr. J. E. Smitherman, of Shreveport, La., for defendant in error.

\*170

\*Mr. Justice CLARKE delivered the opinion of the Court.

In 1907 the city of Shreveport, Louisiana, passed an ordinance requiring that each street car used in its streets should be operated during designated hours by two persons, a conductor and a motorman, and providing penalties for its violation.

The company with street railway lines in the city complied with the requirement until in June, 1917, when it procured some cars equipped for operation by one man, and attempted to use them on its "Allendale Line," with only a motorman in charge. Thereupon the plaintiff in error, hereinafter designated the defendant, who was superintendent of the railway company, was arrested for violation of the ordinance.

He defended by filing a motion to quash the affidavit for arrest, on the ground that the ordinance was unreasonable and arbitrary and that the enforcement of it would deprive the company of its property without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

The motion to quash was "referred to the merits," a full trial was had, the motion was overruled and the defendant, found guilty, was sentenced to pay a fine. The judgment of the Supreme Court of Louisiana affirming this judgment is before us for review on writ of error.

The defense introduced evidence tending to show that the new type of car used was so equipped that it could be operated by one motorman with safety to the public as great as was secured by cars theretofore used when operated by two men. The car, designated in the record as "a one-man car," is described as so arranged that passengers enter and leave it only at the front end, where the motorman is placed. It is so equipped electrically that the motorman must remain in an as-

\*171

signed position necessary for the discharge of his duties and must perform "some conscious act" at all times when the car is in motion. If he fails in this "conscious act," the current is automatically cut off, the brakes are applied in emergency, the rail is sanded, and the door of the car is unlocked, and is so adjusted that opening it lowers the step for use. There is testimony tending to show economy in the use of such cars, not only in the saving of the wages of one man, but also in immunity from accident.

It is apparent from this description derived from the record that it presents for decision the question: Whether the ordinance of 1907, confessedly a valid exercise of the police power when it was passed, was rendered arbitrary and invalid by the development of a car which it is claimed can be operated by one man with as much safety to the traveling public as, and with less cost than, was secured by the two-man car, in use at the time the ordinance was passed and which was contemplated by it.

It is not necessary to decide in this case whether a valid regulating ordinance can be rendered invalid by a change of conditions which render it arbitrary and confiscatory (*Lincoln Gas & Electric Light Co. v. Lincoln*, 250 U. S. 256, 269, 39 Sup. Ct. 454, 63 L. Ed. 968; *Minnesota Rate Cases*, 230 U. S. 352, 473, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18; *Johnson v. Gearlds*, 234 U. S. 422, 426, 34 Sup. Ct. 794, 58 L. Ed. 1383; *Perrin v. United States*, 232 U. S. 478, 481, 34 Sup. Ct. 387, 58 L. Ed. 691; *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 95, 97, 121 N. E. 772, and *Castle v. Mason*, 91 Ohio St. 296, 303, 110 N. E. 463, Ann. Cas. 1917A, 164), for the claim that such a change of condition had arisen in the case is stoutly disputed by the city authorities.

While on the record before us it might be plausibly contended that when all the appliances on the "one-man car" work as it was intended they should, it could be operated with a high degree of safety in streets where

the traffic is not heavy, yet there is evidence that in the short period of the operation of

\*172

such cars in Shreveport, \*the brakes on one of them failed to operate on a descending grade, resulting in the car getting out of control under conditions which, except for good fortune, might have resulted in serious accident. A passenger testified to receiving slight injuries when entering a car, due to the premature closing of the door, and he attributed the accident to the presence of other persons between him and the motorman whose duty it was to close the door. It was in evidence that the line on which these cars were placed, while in general one of light travel, extended into the principal business section of a city of 40,000 inhabitants; that it had at least one steep grade in it; and that at times the travel was heavy and the cars crowded.

It is obvious, and not disputed, that such cars are better adapted to light than to heavy travel, for all passengers must enter and leave at one door, and one man must take fares, make change, issue transfers, answer questions, and also remain in position to start the car promptly. So occupied and placed, plainly this one man could not render such assistance as is often necessary to infirm or crippled, or very young passengers, or to those incumbered with baggage or bundles, and it would not be difficult to suggest emergencies of storm or accident in which a second man might be of first importance to the safety and comfort of passengers.

These "one-man cars" at the time of trial were, as yet, experimental, and enough has been said to show that in each community the operation of street cars presents such special problems—due to the extent and character of the travel, to grades and other conditions—that with peculiar appropriateness they have been committed by the law primarily to the disposition of the local authorities, whose determination will not be disturbed by the courts, except in cases in which the power has been exercised in a manner clearly arbitrary and oppressive. The rule is:

\*173

"That every \*intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." *Dobbins v. Los Angeles*, 195 U. S. 223, 235, 25 Sup. Ct. 18, 20 (49 L. Ed. 169).

Since the record, as we have thus discussed it, fails to show a clear case of arbitrary conduct on the part of the local authorities, the judgment of the Supreme Court of Louisiana is

Affirmed.



(251 U. S. 173)

**HARDIN-WYANDOT LIGHTING CO. v.  
VILLAGE OF UPPER SANDUSKY.**

(Argued Oct. 13, 1919. Decided Dec. 15, 1919.)

No. 10.

**1. CONSTITUTIONAL LAW** **§**117, 292—**ELEC-  
TRICITY** **§**1 — **DUE PROCESS AND OBLIGA-  
TION OF CONTRACT; CHANGE OF LAW AS TO  
USE OF STREET.**

An electric light company, which received a franchise to use the streets of a village, when a statute provided that the "mode" of use thereof shall be such as shall be agreed on by the village authorities and the company, or, if they cannot agree, as shall be directed by the probate court, was not deprived of property without due process of law, nor was the obligation of its contract impaired, by 92 Ohio Laws, p. 204, afterwards passed in the reasonable exercise of the police power, giving to the municipality complete control over the placing in the streets of poles and wires by such companies; that is, where the effect of the statute is not extended to poles and wires in use at the time, but is limited to restoration of those that had been removed and to new additional construction.

**2. COURTS** **§**394(9)—**STATE COURT DECISION  
NOT INVOLVING FEDERAL QUESTION.**

Contention that, if an ordinance were given effect, it would impair the obligation of a contract, is not available, where the judgment of the state court under review was reached independently of and without giving any effect to the ordinance.

**In Error to the Supreme Court of the State of Ohio.**

Suit by the Village of Upper Sandusky against the Hardin-Wyandot Lighting Company. Judgment for plaintiff was affirmed by the Supreme Court of Ohio (93 Ohio St. 428, 113 N. E. 402), and defendant brings error. Affirmed.

\*174

\*Messrs. H. T. Mathers and Andrew Squire, both of Cleveland, Ohio, for plaintiff in error.

Mr. W. R. Hare, of Upper Sandusky, Ohio, for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

In 1889 the council of the village of Upper Sandusky, Ohio, enacted an ordinance, authorizing an electric light and power company, and its assigns, to use the streets of the village for the purpose of erecting and operating electric light wires for the distribution of electric light and power. The ordinance declared that: "The privilege hereby granted" shall entitle the company "to manufacture, sell and distribute light and power by means of electricity to the citizens of the village for public and private uses."

The grantee, accepting the franchise, constructed a generating plant, erected poles,

wires and lamps, and until the year 1912 lighted the streets of the village and sold current to private consumers. In that year the plant and franchise were purchased by the plaintiff in error, hereinafter referred to as the company, which continued to light the streets until the contract which its predecessor had with the village expired. Upon the expiration of that contract the parties entered upon negotiations for a new one, but, failing to agree, the company in October, 1913, removed all of its street lights and took down its poles and

\*175

wires used for such lighting, but continued its commercial business.

In about a year after the company ceased to light the village streets this action was commenced by the filing of a petition by the village which, averring the facts we have stated, further alleged that prior to the removal of the street lighting appliances the village had submitted to the company a schedule of fair prices which it was able and willing to pay for street lighting and which it was willing to authorize the company to charge for commercial lighting and for power, but this was rejected; that by dismantling its street lighting system the company had rendered itself wholly unable to furnish any light whatever for the purpose of public lighting; that, without the consent of the village, it was threatening to place new poles and wires in the streets "to further advance its private interests"; that it had forfeited all rights in the streets, and that it was not possible for the village and company to agree upon terms for future lighting.

The prayer was that the company be enjoined from erecting additional poles, that its franchise be declared forfeited and that it be required to remove all of its equipment from the public streets.

The trial court dismissed the petition, but on appeal the Court of Appeals enjoined the company from erecting poles, wires or lamps in the streets "until the consent of said village shall have been obtained." This decree was affirmed by the Supreme Court of Ohio in the judgment we are reviewing.

In its opinion the Supreme Court held that there was no bill of exceptions or properly authenticated finding of facts before it and that therefore the case must be decided upon the assumption that all of the allegations of the petition were sustained by the evidence; that at the time the ordinance of 1889 was passed and accepted, the applicable state statute provided that the "mode" of use of

\*176

the streets "shall be such as shall be agreed upon between the municipal authorities of the \* \* \* village and the company, but, if they cannot agree, the probate court of the county shall direct what the mode of use shall be" (R. S. 1880) § 3471a, as added by 84 O. L. 7, and R. S. § 3461; and that by an act of the Legislature passed in 1896, seven years after



the date of the village ordinance, the state law was amended into the form which continued to the time of trial, providing that "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street," etc., "without the consent of such municipality." 92 O. L. 204.

[1] This amended law of 1896 is made the basis of the only contention in the case which is sufficiently substantial for special notice, viz., that by it the obligation was impaired of the contract which the company had with the state and village, arising from its acceptance of the ordinance of 1889, and that it was thereby deprived of its property without due process of law.

As we have seen, when the ordinance of 1889 was passed the statute then in force, provided that the "mode" in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree it must be determined by the probate court, and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets instead of the prior qualified control. In this case the original "mode" of use was determined by agreement without action by the probate court.

The prayer of the petition was that because of the dismantling of the street lighting plant

\*177

and of its refusal to \*agree to reasonable rates for the future, all rights of the company in the streets should be declared forfeited and that it should be ordered to remove from them all of its constructions, but the decree of the Court of Appeals, affirmed by the Supreme Court, went to the extent, only, of restraining the company from erecting any poles and wires in the streets "until the consent of the village shall have been obtained." There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that both courts held that the state statutes in force at the time the grant became effective and the form of the proceeding, were such, that a decree annulling such rights as the company had then retained in the streets could not properly be entered in the cause. On this point the Supreme Court said:

"In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to

the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law."

From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction "until the consent of said village shall have been obtained," and so restrained its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court

\*178

\*holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the state.

This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the probate court in case of disagreement with the company as to the "mode" of using the streets.

We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law passed in a reasonable exercise of the police power does not constitute an impairing of the obligation of its contract with the state or village and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. Northern Pacific Railway Co. et al. v. Puget Sound & Willapa Harbor Railway Co., 250 U. S. 332, 39 Sup. Ct. 474, 63 L. Ed. 1013, and cases cited.

[2] Of the contention that if an ordinance passed in 1915 by the village, repealing the ordinance of 1889, were given effect it would result in impairing the obligation of the contract, it is enough to say that it first appears in a supplemental answer filed in the court of appeals, and the case, as we have seen, was disposed of on the assumption that all of the allegations of the petition were sustained by the evidence. No effect whatever was given to that ordinance, either by the Court of Ap-

\*179

peals or by the Supreme Court, but each reached the conclusion we are reviewing in-

dependently of, and without reference to it. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639, 32 Sup. Ct. 577, 56 L. Ed. 924; *Long Sault Development Co. v. Call*, 242 U. S. 272, 277, 37 Sup. Ct. 79, 61 L. Ed. 294.

It results that, since the change of law complained of did not impair any federal constitutional right of the plaintiff in error, the judgment of the Supreme Court of Ohio, restrained to the scope of its opinion, as we have interpreted it, must be  
Affirmed.

Mr. Justice DAY did not participate in the discussion or decision of this case.

(251 U. S. 146)

HAMILTON, Collector of Internal Revenue,  
v. KENTUCKY DISTILLERIES &  
WAREHOUSE CO.

DRYFOOS et al. v. EDWARDS, Collector of  
Internal Revenue.

(Argued Nov. 20, 1919. Decided Dec. 15, 1919.)

Nos. 589, 602.

1. CONSTITUTIONAL LAW ¶81—POLICE POWER; INCIDENTAL EFFECT OF ACT OF CONGRESS.

Though the United States lacks the police power reserved to the states by the Tenth Amendment, yet, when it exerts any power conferred on it by the Constitution, it is no valid objection that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose.

2. WAR ¶2—POWER SUBJECT TO CONSTITUTIONAL LIMITATIONS.

The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations.

3. EMINENT DOMAIN ¶69—TAKING BY UNITED STATES OF PROPERTY WITHOUT COMPENSATION.

If a restriction on the use or disposition of property is such that a state could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation.

4. EMINENT DOMAIN ¶2(1)—WAR-TIME PROHIBITION ACT AS TAKING OF PROPERTY.

The uncompensated restriction on the disposition of liquors imposed by the War-Time Prohibition Act, seven months and nine days from its passage being allowed for unrestricted disposition, and there being no restriction on sale for export or for other than beverage purposes, is not a taking of property within the Fifth Amendment, even if immatured liquor

cannot be advantageously disposed of in that time.

5. WAR ¶2 — EXTENT OF UNITED STATES WAR POWER.

The war power of the United States includes power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen therefrom.

6. CONSTITUTIONAL LAW ¶70(3) — WISDOM OF LEGISLATION.

The court, in passing on the validity of a statute, may not inquire into the motives of Congress, nor the wisdom of the legislation, nor the necessity for the exercise of the power possessed.

7. STATUTES ¶173—PRESUMPTION AS TO CONTINUANCE OF WAR-TIME PROHIBITION ACT.

As against claim that War-Time Prohibition Act has ceased to have validity, because of the ceasing of necessity, and therefore the power of Congress, before the prescribed period of limitation has arrived, every reasonable intendment must be made in favor of its continuing validity.

8. INTOXICATING LIQUORS ¶2½, New, vol. 8A Key-No. Series—CONTINUANCE OF WAR-TIME PROHIBITION.

In view of the facts of public knowledge, that the treaty of peace had not been concluded, that the railroads are still under national control, etc., it cannot be said that the War-Time Prohibition Act has ceased to be valid, even if its continued validity depends on an existing emergency or necessity arising out of the war or incident to it.

9. INTOXICATING LIQUORS ¶13—REPEAL OF WAR-TIME PROHIBITION ACT BY EIGHTEENTH AMENDMENT.

The War-Time Prohibition Act was not repealed by adoption of the Eighteenth Amendment, by its terms to become effective one year after its ratification, on the theory that it impliedly guaranteed liquor dealers a year of grace.

10. INTOXICATING LIQUORS ¶132—"CONCLUSION OF WAR," WITHIN WAR-TIME PROHIBITION ACT.

There is no ground for giving other than its legal meaning to the term "conclusion of war" in War-Time Prohibition Act, by its terms to continue in force "till the conclusion of the present war and thereafter till the termination of demobilization, the date of which shall be determined and proclaimed by the President," and it therefore requires the ratification of peace or the proclamation of peace.

11. INTOXICATING LIQUORS ¶132 — PROCLAIMING DEMOBILIZATION WITHIN WAR-TIME PROHIBITION ACT.

The requirement for determination and proclamation by the President in War-Time Prohibition Act, by its terms to continue in force till conclusion of the war and thereafter till the termination of demobilization, "the date of which shall be determined and proclaimed by the President," cannot be satisfied by passing



references in messages to Congress, nor by newspaper interviews.

Appeal from the District Court of the United States for the Western District of Kentucky.

Appeal from the District Court of the United States for the Southern District of New York.

Two suits for injunction—one, by the Kentucky Distilleries & Warehouse Company against Elwood Hamilton, Collector of Internal Revenue; the other, by Alphons Dryfoos and others against William H. Edwards, Collector of Internal Revenue. In the first case, decree was for plaintiff, and defendant appeals. In the second case, decree was for defendant, and plaintiffs appeal. Reversed in first case; affirmed in second case.

No. 589:

Messrs. William L. Frierson, Asst. Atty. Gen., Alex. C. King, Sol. Gen., of Atlanta, Ga., and W. V. Gregory, U. S. Dist. Atty., of Louisville, Ky., for appellant.

Messrs. Levy Mayer, of Chicago, Ill., and William Marshall Bullitt, of Louisville, Ky., for appellee.

No. 602:

Mr. Walter C. Noyes, of New York City, (Messrs. Moses J. Stroock, Arthur L. Strasser, and Walter S. Dryfoos, all of New York City, of counsel), for appellants.

Messrs. Levi Cooke and George R. Beneman, both of Washington, D. C., amici curiæ and general counsel to the National Association of Distillers and Wholesale Dealers.

Messrs. Alex. C. King, Sol. Gen., of Atlanta, Ga., and William L. Frierson, Asst. Atty. Gen., for the United States.

\*153

\*Mr. Justice BRANDEIS delivered the opinion of the Court.

The armistice with Germany was signed November 11, 1918. Thereafter Congress passed, and on November 21, 1918, the President approved the War-Time Prohibition Act (40 Stat. 1045, 1046, c. 212), which provides as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the army and navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. \* \* \*

On October 10, 1919, the Kentucky Distilleries & Warehouse Company, owner of distillery warehouses and of whisky therein, brought in the District Court of the United

States for the Western District of Kentucky a suit against Hamilton, collector of internal revenue for that district, alleging that the above act was void or had become inoperative, and praying that he be enjoined from interfering, by reason of that act, with the

\*154

usual process of \*withdrawal, distribution and sale of the whisky in bond. The case was heard before the District Judge on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. A decision without opinion was rendered for the plaintiff; and, the defendant declining to plead further, a final decree was entered granting a permanent injunction in accordance with the prayer of the bill. A similar suit seeking like relief was brought on October 29, 1919, by Dryfoos, Blum & Co., in the District Court of the United States for the Southern District of New York, against Edwards, collector for that district. That case was heard on November 5 before the District Judge on like motions for a preliminary injunction and to dismiss. An opinion was filed November 14, 1919, holding the act in force, and on the following day a final decree was entered dismissing the bill.

The essential facts in the two cases differ in this: In the Kentucky case the whisky was stored in a distillery warehouse; the plaintiff was the maker of the whisky, had owned it prior to the passage of the act, and had, since June 30, 1919, paid the revenue tax on part of it. In the New York case the liquors were in general and special bonded warehouses, the plaintiffs were jobbers, and it does not appear when they became the owners of the liquors. Both cases come here by direct appeal under section 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]), were argued on the same day, and may be disposed of together. Four contentions are made in support of the relief prayed for: (1) That the act was void when enacted because it violated the Fifth Amendment; (2) that it became void before these suits were brought by reason of the passing of the war emergency; (3) that it was abrogated or repealed by the Eighteenth Amendment; (4) that by its own terms it expired before the commencement of these suits. These contentions will be considered in their order.

[1-4] First. Is the act void because it

\*155

takes private property \*for public purposes without compensation in violation of the Fifth Amendment? The contention is this: The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power "to make all laws \* \* \* necessary and proper for carrying into execution" the war powers expressly granted. Article 1, § 8, cl. 18. Congress might under this implied power



temporarily regulate the sale of liquor and, if reasonably necessary, forbid its sale in order to guard and promote the efficiency of the men composing the army and the navy and of the workers engaged in supplying them with arms, munitions, transportation and supplies. *McKinley v. United States*, 249 U. S. 397, 399, 39 Sup. Ct. 324, 63 L. Ed. 668. But the exercise of the war powers is (except in respect to property destroyed by military operations, *United States v. Pacific Railroad*, 120 U. S. 227, 239, 7 Sup. Ct. 490, 30 L. Ed. 634) subject to the Fifth Amendment. *United States v. Russell*, 13 Wall. 623, 627, 20 L. Ed. 474. The severe restriction imposed by the act upon the disposition of liquors amounts to a taking of property, and, being uncompensated, would, at least as applied to liquors acquired before the passage of the act, exceed even the restriction held to be admissible under the broad police powers possessed by the states. Therefore, since it fails to make provision for compensation, which in every other instance Congress made when authorizing the taking or use of property for war purposes,<sup>1</sup> it is void. Such is the argument of the plaintiffs below.

\*156

\*That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case*, 188 U. S. 321, 357, 23 Sup. Ct. 321, 47 L. Ed. 492; *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Hipolite Egg Co. v. United States*,

220 U. S. 45, 58, 31 Sup. Ct. 364, 55 L. Ed. 364; *Hoke v. United States*, 227 U. S. 308, 323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *Seven Cases v. United States*, 239 U. S. 510, 515, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164; *United States v. Doremus*, 249 U. S. 86, 93, 94, 39 Sup. Ct. 214, 63 L. Ed. 493. The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations. (*Ex parte Milligan*, 4 Wall. 2, 121-127, 18 L. Ed. 281; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336, 13 Sup. Ct. 622, 37 L. Ed. 463; *United States v. Joint Traffic Assoc.*, 171 U. S. 505, 571, 19 Sup. Ct. 25, 43 L. Ed. 259; *McCray v. United States*, 195 U. S. 27, 61, 24 Sup. Ct. 769, 49 L. Ed. 18, 1 Ann. Cas. 561; *United States v. Cress*, 243 U. S. 316, 326, 37 Sup. Ct. 380, 61 L. Ed. 746); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power (*In Re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 34 L. Ed. 519; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 410, 26 Sup. Ct. 66, 50 L. Ed. 246). If the nature and conditions of a restric-

\*157

\*tion upon the use or disposition of property is such that a state could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency.

There was no appropriation of the liquor for public purposes. The War-Time Prohibition Act fixed a period of seven months and nine days from its passage during which liquors could be disposed of free from any restriction imposed by the federal government. Thereafter, until the end of the war and the termination of mobilization, it permits an unrestricted sale for export and, within the United States, sales for other than beverage purposes. The uncompensated restriction upon the disposition of liquors imposed by this act is of a nature far less severe than the restrictions upon the use of property acquired before the enactment of the prohibitory law which were held to be permissible in cases arising under the Fourteenth Amendment. *Mugler v. Kansas*, 123 U. S. 623, 668, 8 Sup. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 23, 9 Sup. Ct. 6, 32 L. Ed. 346. The question whether an absolute prohibition of sale could be applied by a state to liquor acquired before the enactment of the prohibitory law has been raised by this court, but not answered, because unnecessary to a decision. *Bartemeyer v. Iowa*, 18 Wall. 129, 133, 21 L. Ed. 929; *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 33, 24 L. Ed. 989;

<sup>1</sup> War Acts authorizing the seizure or requisition of property:

March 4, 1917, c. 180, 39 Stat. 1163, 1193 (Comp. St. 1918, §§ 3115<sup>1</sup>/<sub>10b</sub>, 3115<sup>1</sup>/<sub>10c</sub>); July 1, 1918, c. 113, 40 Stat. 634, 651—factories, ships, and war materials. June 15, 1917, c. 29, 40 Stat. 182, 183; April 22, 1918, c. 62, 40 Stat. 535 (Comp. St. 1918, §§ 3115<sup>1</sup>/<sub>10d</sub>, 3115<sup>1</sup>/<sub>10dd</sub>); Nov. 4, 1918, c. 201, 40 Stat. 1020—street railroads, equipment, etc., and the acquisition to title to lands, plants, etc. August 10, 1917, c. 53, 40 Stat. 276, 279 (Comp. St. 1918, §§ 3115<sup>1</sup>/<sub>4bh</sub>-3115<sup>1</sup>/<sub>4jj</sub>); Food Control Act—foods, fuels, factories, packing houses, coal mines, coal supplies, etc. March 21, 1918, c. 25, 40 Stat. 451 (Comp. St. 1918, §§ 3115<sup>1</sup>/<sub>4a</sub>-3115<sup>1</sup>/<sub>4p</sub>)—railroads. May 16, 1918, c. 74, 40 Stat. 550, 551 (Comp. St. 1918, § 3115<sup>1</sup>/<sub>4a</sub>); May 31, 1918, c. 90, 40 Stat. 593—houses, buildings, properties, etc., in District of Columbia. July 18, 1918, c. 157, 40 Stat. 913, 915—ships. July 16, 1918, c. 154, 40 Stat. 904—telephone and telegraph systems. October 5, 1918, c. 181, 40 Stat. 1009, 1010—mines, mineral lands, etc.

See, also, Act June 3, 1916, c. 134, 39 Stat. 166, 213, for the mobilization of industries, which authorizes the seizure of munition plants and provides that the compensation therefor shall be "fair and just," and Act March 4, 1917, c. 180, 39 Stat. 1163, 1169 (Comp. St. 1918, § 3115<sup>1</sup>/<sub>32f</sub>), authorizing the acquisition of aeroplane patents by condemnation, for which \$1,000,000 was appropriated.

Eberle v. Michigan, 232 U. S. 700, 706, 34 Sup. Ct. 464, 58 L. Ed. 803; Barbour v. Georgia, 249 U. S. 454, 459, 39 Sup. Ct. 316, 63 L. Ed. 704. See, however, Mugler v. Kansas, supra, 123 U. S. 623, 625, 657, 8 Sup. Ct. 273, 31 L. Ed. 205. But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the Fourteenth Amendment, or why such

\*158

a federal law should be obnoxious to the Fifth Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918. The amount then in storage was materially less than was usually carried,<sup>2</sup> because no such liquor could be lawfully made in America under the Lever Food and Fuel Control Act (Act Aug. 10, 1917, c. 53, § 15, 40 Stat. 276, 282 [Comp. St. 1918, § 3115½]) after September 9, 1917. And if, as is suggested, the liquors remaining in bond November 21, 1918, were not yet sufficiently ripened or aged to permit them to be advantageously disposed of within the limited period of seven months and nine days thereafter, the resulting inconvenience to the owner, attributable to the inherent qualities of the property itself, cannot be regarded as a taking of property in the constitutional sense. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 332, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845.

[5-8] Second. Did the Act become void by the passing of the war emergency before the commencement of these suits? It is conceded that the mere cessation of hostilities under the armistice did not abridge or suspend the power of Congress to resort to prohibition

\*159

of the liquor traffic \*as a means of increasing our war efficiency, that the support and care of the army and navy during demobilization was within the war emergency, and that, hence, the act was valid when passed. The contention is that between the date of its enactment and the commencement of these suits it had become evident that hostilities would not be resumed, that demobilization had been effected, that thereby the war emergency was removed, and that when the emergency ceased the statute became void.

To establish that the emergency has passed, statements and acts of the President and of other executive officers are adduced; some of them antedating the enactment of the statute here in question. There are statements

of the President to the effect that the war has ended<sup>3</sup> and peace has come,<sup>4</sup> that certain war agencies and activities should be discontinued,<sup>5</sup> that our enemies are impotent to renew hostilities<sup>6</sup> and that the objects of the act here in question have been satisfied in the demobilization of the army and navy.<sup>7</sup> It is shown that many war-time activities have been suspended, that vast quantities of war materials have been disposed of, that trade with Germany has been resumed, and that the censorship of postal, telegraphic and wire communications has been removed.<sup>8</sup> But we have also the fact that since these state-

\*160

ments were made and these acts \*were done, Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act, which, in making further provision for the administration of the War-Time Prohibition Act, treats the war as continuing and demobilization as incomplete; that the Senate, on November 19, 1919, refused to ratify the Treaty of Peace with Germany;<sup>9</sup> that under the provisions of the Lever Act the President resumed, on October 30, 1919, the control of the fuel supply which he had relinquished partly on January 31, 1919, and partly on February 20, 1919;<sup>10</sup> that he is still operating the railroads, of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641, because it diminished that control,<sup>11</sup> that pursuant to the Act of March 4, 1919, c. 125, 40 Stat. 1348, he continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour; that through the United States Sugar Equalization Board, In-

173. The following explanation is given by the commissioner (page 51) why more was not withdrawn: "The high rates of tax on spirits, fermented liquors and wines which were provided in the bill subsequently enacted into law as the Revenue Act of 1918, prompted many dealers to make heavy purchases of these commodities prior to the passage of the act and, as a consequence of this action on the part of the dealers as well as of the expansion of prohibition territory throughout the United States the withdrawals from bonded warehouses materially declined after the passage of the act."

<sup>3</sup> Address to Congress, Official U. S. Bulletin, Nov. 11, 1918, p. 5.

<sup>4</sup> Thanksgiving Proclamation, Official U. S. Bulletin, Nov. 18, 1918, p. 1.

<sup>5</sup> Address to Congress, Dec. 2, 1918, Official U. S. Bulletin, Dec. 2, 1918, p. 6.

<sup>6</sup> Armistice Commemoration Proclamation, Nov. 11, 1919.

<sup>7</sup> Veto Message, October 27, 1919, Congressional Record, Oct. 27, 1919, p. 8063.

<sup>8</sup> U. S. Official Bulletin, Nov. 12, 1918, p. 3; Nov. 22, 1918, p. 1; Nov. 27, 1918, p. 7; Dec. 12, 1918, p. 4; Dec. 20, 1918, p. 4; Dec. 30, 1918, p. 7; United States Bulletin, Feb. 27, 1919, p. 6; May 8, 1919; May 12, 1919, p. 14; Oct. 20, 1919, p. 17.

<sup>9</sup> Congressional Record, Nov. 19, 1919, p. 9321.

<sup>10</sup> United States Bulletin, Nov. 10, 1919, p. 9; U. S. Official Bulletin, Jan. 18, 1919, p. 1.

<sup>11</sup> Congressional Record, Nov. 19, 1919, p. 932.

<sup>2</sup> The amount of distilled spirits of all kinds in bonded warehouses June 30, 1919, was 72,358,151.1 gallons as compared with 282,036,460.2, June 30, 1914; 253,668,341.3 gallons, June 30, 1915; 232,402,873.3 gallons, June 30, 1916; 194,832,682.6 gallons, June 30, 1917; 158,959,264.5 gallons, June 30, 1918. Report of the Commissioner of Internal Revenue for 1919, p.



corporated, he still regulates the price of sugar; that in his message to Congress on December 2, 1919, he urgently recommended the further extension for six months of the powers of the Food Administration; that as commander-in-chief he still keeps a part of the army in enemy occupied territory and another part in Siberia; and that he has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.

The present contention may be stated thus: That notwithstanding the act was a proper exercise of the war power of Congress at the date of its approval and contains its own period of limitation—"until the conclusion of the present war and thereafter until

\*161

the termination of demobilization"—the progress of events since that time had produced so great a change of conditions and there now is so clearly a want of necessity for conserving the man power of the nation, for increased efficiency in the production of arms, munitions, and supplies, that the prohibition of the sale of distilled spirits for beverage purposes can no longer be enforced, because it would be beyond the constitutional authority of Congress in the exercise of the war power to impose such a prohibition under present circumstances. Assuming that the implied power to enact such a prohibition must depend, not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (*United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615; *The Protector*, 12 Wall. 700, 702, 20 L. Ed. 463; *Hijo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994), but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in *Stewart v. Kahn*, 11 Wall. 493, 507, 20 L. Ed. 176:

"The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress. *United States v. Des Moines Navigation Co.*, 142 U. S. 510, 544, 12 Sup. Ct. 308, 35 L. Ed. 1099; *McCray v. United States*, 195 U. S. 27, 53-59, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Weber v. Freed*, 239 U. S. 325, 330, 36 Sup. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317; *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 184, 39 Sup. Ct. 507, 63 L. Ed. 910. Nor may the court inquire into the wisdom of the legislation. *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23; *Brushaber v.*

*Union Pacific Railroad Co.*, 240 U. S. 1, 25, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414; *Rast v. Van Deman & Lewis*, 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of

\*162

a \*power is not an argument against its existence. *Lottery Case*, 188 U. S. 321, 363, 23 Sup. Ct. 321, 47 L. Ed. 492.

That a statute valid when enacted may cease to have validity owing to a change of circumstances has been recognized, with respect to state laws, in several rate cases. *Minnesota Rate Cases*, 230 U. S. 352, 473, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Missouri Rate Cases*, 230 U. S. 474, 508, 33 Sup. Ct. 976, 57 L. Ed. 1572; *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 268, 39 Sup. Ct. 454, 63 L. Ed. 968. That the doctrine is applicable to acts of Congress was conceded *arguendo* in *Perrin v. United States*, 232 U. S. 478, 486, 34 Sup. Ct. 387, 58 L. Ed. 691, and *Johnson v. Gearlds*, 234 U. S. 422, 446, 34 Sup. Ct. 794, 58 L. Ed. 1383. In each of these cases Congress had prohibited the introduction of liquor into lands inhabited by Indians without specified limit of time; in one case, the prohibition was in terms perpetual; in the other, it was to continue "until otherwise provided by Congress." In both cases it was contended that the constitutional power of Congress over the subject-matter necessarily was limited to what was reasonably essential to the protection of the Indians. In the *Perrin Case* it was contended (232 U. S. 482, 34 Sup. Ct. 387, 58 L. Ed. 691) that the power was transcended because the prohibition embraced territory greatly in excess of what the situation reasonably required, and because its operation was not confined to a designated period reasonable in duration but apparently was intended to be perpetual. In *Johnson v. Gearlds* the contention was (234 U. S. 442, 34 Sup. Ct. 794, 58 L. Ed. 1383) that a prohibition originally valid had become obsolete by reason of changes in the character of the territory included in it and the status of the Indians therein. In both cases the court, while assuming that since the power to impose a prohibition of this character was incident to the presence of the Indians and their status as wards of the government and did not extend beyond what was reasonably essential to their protection, it followed that a prohibition valid in the beginning would become inoperative when in regular course the Indians affected were completely emanci-

\*163

pated from federal guardianship and control, nevertheless held that the courts would not be justified in declaring that the restriction either was originally invalid or had become obsolete if any considerable number of Indians remained wards of the government with-



in the prohibited territory. In each case the decision rested upon the ground that the question what was reasonably essential to the protection of the Indians was one primarily for the consideration of the lawmaking body, that Congress was invested with a wide discretion, and that its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Conceding, then, for the purposes of the present case, that the question of the continued validity of the War-Time Prohibition Act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.

[9] Third. Was the act repealed by the adoption of the Eighteenth Amendment?

\*164

By the express terms of the \*amendment the prohibition thereby imposed becomes effective after one year from its ratification. Ratification was proclaimed on January 29, 1919 (40 Stat., part 2, appendix p. 1942). The contention is that, as the amendment became on its adoption an integral part of the Constitution, its implications are as binding as its language; that in postponing the effective date of the prohibition the amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace; and that not only was Congress prohibited thereby from enacting meanwhile new prohibitory legislation, but also that the then existing restriction imposed by the War-Time Prohibition Act was removed. See *Narragansett Brewing Co. v. Baker & O'Shaunessy* (U. S. D. Ct. R. I., November 12, 1919).

The Eighteenth Amendment, with its implications, if any, is binding, not only in times of peace, but in war. If there be found by implication a denial to Congress of the right to forbid before its effective date any

prohibition of the liquor traffic, that denial must have been operative immediately upon the adoption of the amendment, although at that time demobilization of the army and the navy was far from complete. If the amendment effected such a denial of power, then it would have done so equally, had hostilities continued flagrant or been renewed. Furthermore, the amendment is binding alike upon the United States and the individual states. If it guarantees a year of immunity from interference by the federal government with the liquor traffic, even to the extent of abrogating restrictions existing at the time of its adoption, it is difficult to see why the guaranty does not extend also to immunity from interference by the individual states, with like results also as to then existing state legislation. The contention is clearly unsound.

[10, 11] Fourth. Did the prohibition imposed by the act expire by limitation before the commencement of these suits? The period therein prescribed is "until the conclu-

\*165

sion of \*the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." It is contended both that the war has been concluded and that the demobilization has terminated.

In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace. *Hijo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994; *The Protector*, 12 Wall. 700, 702, 20 Ed. 463; *United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615. From the fact that other statutes concerning war activities contain each a specific provision for determining when it shall cease to be operative,<sup>12</sup> and from the alleged absence

<sup>12</sup> The provisions fixing the date of expiration of the several war acts are as follows:

Aircraft Act, being chapter 16, of the Army Appropriation Act of July 9, 1918, c. 143, 40 Stat. 889 (Comp. St. 1918, § 3115<sup>1/2</sup>): "Within one year from the signing of a treaty of peace with the Imperial German government."

Departmental Reorganization Act of May 20, 1918, c. 78, 40 Stat. 556 (Comp. St. 1918, § 283a): "That this act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace."

Emergency Shipping Fund Act of June 15, 1917, c. 29, 40 Stat. 182, as amended by the Act of April 22, 1918, c. 62, 40 Stat. 535, and by the Act of November 4, 1918, c. 201, 40 Stat. 1020: "All authority \* \* \* shall cease six months after a final treaty of peace is proclaimed between this government and the German Empire."

Charter Rate and Requisition Act of July 18, 1918, c. 157, 40 Stat. 913: "All power and authority \* \* \* shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German government."

Railroad Control Act of March 21, 1918, c. 25, § 14, 40 Stat. 451, 458 (Comp. St. 1918, § 3115<sup>3/4</sup>): " \* \* \* Federal control \* \* \* shall continue for

\*166

of \*such a provision here, it is argued that the term "conclusion of the war" should not be given its ordinary legal meaning; that instead it should be construed as the time when actual hostilities ceased; or when the treaty of peace was signed at Versailles, on June 28, 1919, by the American and German representatives; or, more generally, when the actual war emergencies ceased by reason of our complete victory and the disarmament of the enemy, coupled with the demobilization of our army and the closing of war activities; or when the declared purpose of the act of "conserving the man power of the na-

\*167

tion, and to increase \*efficiency in the production of arms, munitions, ships, food, and clothing for the army and navy" shall have been fully satisfied. But there is nothing in the words used to justify such a construction. "Conclusion of the war" clearly did not mean cessation of hostilities, because the act was approved 10 days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by the phrase to designate the date when the Treaty of Peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approv-

and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation \* \* \* of the exchange of ratifications of the treaty of peace."

Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, 283 (Comp. St. 1918, § 3115½pp): "Sec. 24. That the provisions of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

Trading with the Enemy Act of October 6, 1917, c. 106, § 2, 40 Stat. 411, 412 (Comp. St. 1918, § 3115½aa): "The words 'end of the war,' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this act."

Soldiers' and Sailors' Civil Relief Act of March 8, 1918, c. 20, 40 Stat. 440, 441, 449: "(5) The term 'termination of the war' as used in this act shall mean the termination of the present war by the treaty of peace as proclaimed by the President. \* \* \* Sec. 603. That this act shall remain in force until the termination of the war, and for six months thereafter." Comp. St. 1918, § 3078¼s. Saulsbury Resolution of May 31, 1918, c. 90, 40 Stat. 593: "That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German government, unless in the meantime otherwise provided by Congress. \* \* \*"

Wheat Price Guarantee Act of March 4, 1919, c. 125, § 11, 40 Stat. 1348, 1353: "That the provisions of this act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty."

ed by the Senate. Furthermore, to construe "conclusion of the war" as meaning the actual termination of war activities, would leave wholly uncertain the date when the act would cease to be operative; whereas Congress evinced here, as in other war statutes, a clear purpose that the date of expiration should be definitely fixed. The reason why this was not directed to be done by a proclamation of peace is made clear by the use of the word "thereafter." It was expected that the "conclusion of the war" would precede the termination of demobilization. Congress, therefore, provided that the time when the act ceased to be operative should be fixed by the President's ascertaining and proclaiming the date when demobilization had terminated.

It is insisted that he has done so. The contention does violence to both the language and the evident purpose of the provision. The "date of which shall be determined and proclaimed by the President" is a phrase so definite as to leave no room for construction. This requirement cannot be satisfied by passing references in messages to Congress, nor by newspaper interviews with high officers of the army or with officials of the War Department. When the President mentioned in his veto message the "demobilization of the army and navy," the words were doubtless used in

\*168

a popular sense, \*just as he had declared to Congress, on the occasion of the signing of the armistice: "The war thus comes to an end." If he had believed on October 28, 1919, that demobilization had, in an exact sense, terminated, he would doubtless have issued then a proclamation to that effect; for he had manifested a strong conviction that restriction upon the sale of liquor should end. Only by such proclamation could the purpose of Congress be attained, and the serious consequences attending uncertainty be obviated. But in fact demobilization had not terminated at the time of the veto of the act of October 28, 1919, or at the time these suits were begun, and, for aught that appears, it has not yet terminated. The report of the Secretary of War made to the President under date of November 11, 1919 (and transmitted to Congress on December 1), in describing the progress of demobilization, shows (p. 17) that during the preceding ten days (November 1-10) 2,018 officers and 10,266 enlisted men had been discharged; the rate of discharge being substantially the same as during the month of October, in which 8,690 officers and 33,000 enlisted men were discharged.

The War-Time Prohibition Act being thus valid and still in force, the decree in No. 589 is reversed, and the case is remanded to the District Court, with directions to dismiss the bill; and the decree in No. 602 is affirmed.

No. 589. Reversed.

No. 602. Affirmed.



(251 U. S. 182)

BRANSON, Sheriff and Collector, et al. v. BUSH.

(Argued Nov. 14, 1919. Decided Dec. 22, 1919.)

No. 82.

1. CONSTITUTIONAL LAW ⇨229(3) — HIGHWAYS ⇨122 — HIGHWAY ASSESSMENT AGAINST RAILROAD NOT WANTING IN EQUAL PROTECTION.

The assessment of the main track of a railroad, pursuant to Acts Ark. 1911, p. 233, § 2, declaring that the franchises (other than the right to be a corporation) of railroads are property, and that the value thereof shall be considered when assessing the property of such corporations, is not an adding of personal property value to the value of the real estate, but merely a determination of the value of the company's road, having regard to the use it makes of it, so that a railroad assessed on that basis, under Sp. & Priv. Acts Ark. 1911, p. 642, for improvement of a highway, is not discriminated against in favor of owners of other real estate, and so denied the equal protection of the laws.

2. CONSTITUTIONAL LAW ⇨290(1)—DUE PROCESS; LEGISLATIVE DETERMINATION OF BENEFITS.

In providing for an improvement which the state has power to make and pay for by assessments on the property benefited, the Legislature, under its taxing power, can, by the statute imposing the tax, determine what lands, which might be benefited by the improvement, are in fact benefited by it, and, doing so, its determination is conclusive, subject to be assailed under the Fourteenth Amendment, only where arbitrary, capricious, or confiscatory.

3. CONSTITUTIONAL LAW ⇨290(1) — HIGHWAYS ⇨140—LEGISLATIVE DETERMINATION OF BENEFITS BY HIGHWAYS NOT WANTING IN DUE PROCESS.

On the evidence, in suit attacking assessment of a railroad for improvement of a highway, *held*, that the action of the Legislature (Sp. & Priv. Acts Ark. 1911, p. 642), in declaring the railroad's property within the district benefited by the improvement, could not be characterized as arbitrary, capricious, or confiscatory, and so in contravention of the Fourteenth Amendment.

Mr. Justice McReynolds, dissenting.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by R. F. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company, against J. H. Branson, sheriff and collector of Crawford County, and others. Decree for defendants was reversed by the Circuit Court of Appeals (248 Fed. 377, 160 C. C. A. 387) and defendants appeal. Reversed.

\*183

\*Messrs. George B. Rose, W. E. Hemingway, and J. F. Loughborough, all of Little Rock, Ark., for appellants.

Mr. Thomas B. Pryor, of Ft. Smith, Ark., for appellee.

Mr. Justice CLARKE delivered the opinion of the Court.

By act of the General Assembly the state of Arkansas created "Crawford County Road Improvement District No. 2," a body corporate, and prescribed its boundaries. Special & Private Acts of Arkansas 1911, p. 642.

To pay the cost of the road improvement contemplated the act provided that it should be made a charge upon all of the real property, railroads and tramroads in the district. Bonds were sold and the road completed before this suit was commenced to enjoin the collection of taxes charged against the property of the railway company, of which the appellee, hereinafter designated the company, was receiver. The tax objected to was imposed upon the assessed value of the main track, side tracks, rolling stock, buildings and material of the company apportioned to the road district under a state law for the valuation of railroad property, and in the bill it is alleged to be invalid because the assessment conflicts with many provisions of the Constitutions of the United States and of Arkansas. The rate was the same for all real property in the district.

The District Court permanently enjoined the tax to the extent that it was imposed on personal property—the rolling stock and materials of the company. From this part of the decree no appeal was taken and thereafter all question as to the invalidity of the assessment because including rolling stock and materials disappeared from the case. But, for want of equity, the bill was dis-

\*184

missed so far as applicable to the real estate "designated in the bill as main track, side track and buildings." On appeal by the company from this part of the decree, the Circuit Court of Appeals reversed the decree of the District Court and enjoined the collection of the tax on the real estate on two grounds:

(1) Because the including of the franchise and other intangible property of the company in the assessment results in "a higher rate of taxation" on the property of the railway company than on the other property in the district, and

(2) Because the evidence fails to show that the company would derive any benefit from the improvement of the road.

In this court the plaintiffs in error, hereinafter referred to as the road district, assign as errors these two holdings of the Circuit Court of Appeals, and we shall consider them in the order stated.



[1] All property of the railway company in the state was assessed by a state tax commission under an act, the validity of which is not assailed, providing:

"The franchises (other than the right to be a corporation) of all railroads \* \* \* are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations." Acts of Arkansas 1911, p. 233, § 2.

The act also required the commission to "determine the total value of the entire property of the corporation, tangible and intangible"; that the buildings and side tracks should be assessed as real estate in the town or district where located, but that the main track, also to be assessed as real estate, should be apportioned among the several towns and districts through which the road ran according to the "actual mileage in each town or district."

\*185

\*The Circuit Court of Appeals did not hold either the railroad valuation or the district road improvement law unconstitutional, both being types of laws often upheld by this court (State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, Cleveland, etc., R. R. Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041, and Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266), but the first ground of its decision was, only, that the assessment of the main track under the former law, as applied to the case of taxation by benefits provided for by the latter, resulted in unequal taxation to an extent amounting to a denial of the equal protection of the laws.

The court was carried to its conclusion by this process: The act creating the road district, and the general law applicable to local assessments in proportion to benefits, both required that only real estate should be assessed to pay for the improvement here involved; only the real estate of the other property owners of the district was assessed, and therefore when the franchises, personalty, of the railroad company were "considered" in making the assessment complained of, the company was taxed a "higher rate," a greater amount, than other property owners and by such discrimination was denied the equal protection of the laws.

It is argued by the road district that this conclusion is erroneous, for the reasons following:

The assessment law, which we have quoted, provides that the franchises of railroad companies ("other than the right to be a corporation") "shall be considered" by officials when assessing their property.

It is to be noted that this law does not provide for the assessment of the franchises of railroad companies separately as personal, or intangible property, as the laws of some

states require, but only declares that they are "property" which "shall be considered by assessing officers when assessing the property of such corporations" and they are not valued

\*186

separately in the \*assessment complained of, as it is itemized in the bill of complaint.

It is not easy to define just what is meant by the "franchise" of a railroad company "other than the right to be a corporation" and the record does not attempt a definition. Morgan v. Louisiana, 93 U. S. 217, 223, 23 L. Ed. 860. The record is also silent as to what, if any, value was placed upon the franchises of the company here involved by the state tax commission, and as to what extent, if at all, they were "considered" in arriving at the assessment objected to, and therefore, it is contended, that the conclusion of the Circuit Court of Appeals that personal property value was included in the assessment of the real estate of the district has no foundation on which to rest, other than the assumption that the tax commission conformed to the law and "considered" the franchises when assessing the real estate and that this necessarily resulted, in fact, if not in form, in such inclusion—an unusually meager basis surely for invalidating a tax of the familiar character of this before us.

If, however, the distinction sometimes taken between the "essential properties of corporate existence" and the franchises of a corporation (Memphis, etc., R. R. Co. v. Commissioner, 112 U. S. 609, 619, 5 Sup. Ct. 299, 28 L. Ed. 837) be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the state commission in making the assessment here involved, this would result, not in adding personal property value to the value of the real estate of the company in the district, but simply in determining what the value of the real property was—its right of way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as a part of a railroad unit and a

\*187

going concern \*than it would have if considered only as a quantity of land, buildings and tracks.

This is the method of assessing railroad property often approved by this court, specifically in Cleveland, etc., R. R. Co. v. Backus, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 1124 (38 L. Ed. 1041), saying:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitability of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results

from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

And long experience has confirmed the statement by Mr. Justice Miller in Railroad Tax Cases, 92 U. S. 575, 608 (23 L. Ed. 663), that:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

And see Kentucky Railroad Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414, in which, also, the contention is disposed of that the railroad track should be valued by the same officials and on the same basis of acreage as farm lands adjacent to it.

Thus, the assessment complained of was made under valid laws and in a manner approved and customary in arriving at the val-

\*188

ue of that part of railroad tracks \*situate in a state, county or district. So far as this record shows, the assessment, modified by the decree of the District Court not appealed from, is not a composite of real and personal property values, but is the ascertained value of the real estate—the tracks and buildings—of the company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed, a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement. No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employes of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which "was not intended to compel the states to adopt an iron rule of equal taxation." Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237, 10 Sup. Ct. 533, 535 (33 L. Ed. 892). And see French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; Cass Farm Co. v. Detroit, 181 U. S. 396, 398, 21 Sup. Ct. 644, 45 L. Ed. 914;

Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917.

Thus, the basis for assuming that the franchises of the railroad company were added as a separate personal property value to the assessment of the real property of the company becomes, upon this record, much too unsubstantial to justify invalidating the tax involved if it be otherwise valid, and the first assignment of error must therefore be sustained.

[2] But the holding of the Circuit Court of

\*189

Appeals that "the evidence fails to show that the railroad company derives any benefit from the road" is also assigned as error.

In the act of the General Assembly creating this road district it is provided:

"Sec. 5. It is ascertained and hereby declared that all real property within said district, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized. \* \* \* Special and Private Acts of Arkansas 1911, pp. 642, 645.

Where, in laws creating districts for local improvements and taxation, there is such a legislative declaration as this, as to what lands within the district will be benefited by the improvement, the law with respect to the extent to which such determination may be reviewed by the courts is so well settled, and has so lately been re-examined and restated by this court, that extended discussion of the subject is not justified.

In Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763—a decision often cited and approved—it is decided that if the proposed improvement is one which the state had authority to make and pay for by assessments on property benefited, the Legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not.

The subject was carefully re-examined and

\*190

the law \*restated in cases so recent as Wagner v. Baltimore, 239 U. S. 207, 36 Sup. Ct. 66, 60 L. Ed. 230, and Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is "arbitrary,



wholly unwarranted," "a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property." And see *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 69, 39 Sup. Ct. 200, 63 L. Ed. 479; *Hancock et al. v. Muskogee*, 250 U. S. 454, 457, 39 Sup. Ct. 528, 63 L. Ed. 1081; *Embree v. Kansas City, etc., Road District*, 240 U. S. 242, 250, 36 Sup. Ct. 317, 60 L. Ed. 624.

The decisions relied upon by the company (*Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190; *Gast Realty & I. Co. v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523) are not in conflict with the rule but plainly fall within, and are illustrations of, the qualification of it.

[3] An application of this rule to the case before us renders not difficult the decision of the second assignment of error.

The road to be improved was "a little less than 3½ miles in length" and extended from Alma, a considerable village, on the north, southerly to an east and west road which had its western terminus at the city of Van Buren, 8 miles west of the junction of the two roads. It was the principal road to and from Alma, the travel on it being greater than on all the other roads which served that village combined. In wet seasons the road was practically impassable for wagons, sometimes for three or four months together. People living south of the east and west road, who made Van Buren their trading point in wet weather, after the road was improved traded exclusively at Alma, it being 4½ miles nearer for many of them. The

\*191

railway of the appellee was the only \*one at Alma, but at Van Buren there was a competing road, with a line 250 miles shorter than that of the appellee to St. Louis, the chief market for the staples of the region.

On the question of benefits which would come to the railroad property from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road.

For the district, three witnesses were called, one a doctor, one a merchant and one a long-time resident of the village of Alma. Each of these testified that, in his opinion,

the road, by making the village of Alma more accessible, particularly in the wet seasons of the year, and by developing the adjacent country, would increase the business of the railway company and would divert business from Van Buren, where there was a competing railroad, to Alma, where appellee had the only line. It was in evidence also that after the act was passed, but before the road was completed, a large gas-producing district was discovered not far south of the southern terminus of the improved road which was tributary to it.

To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads.

This discussion of the record makes it clear that it is impossible to characterize as arbitrary, capricious, or confiscatory the ac-

\*192

tion of the General Assembly, in declaring that the property of the railroad company within the district would be benefited by the construction of the contemplated road improvement, but, on the contrary, it makes it apparent that the case is one so fully within the general rule that the holding of the Circuit Court of Appeals that the railroad would not be benefited by the improvement cannot be sustained.

It results that the decree of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

Mr. Justice McREYNOLDS dissents.

(251 U. S. 179)

GODCHAUX CO., Inc., v. ESTOPINAL, Sheriff, et al.

(Argued Nov. 17, 18, 1919. Decided Dec. 22, 1919.)

No. 101.

COURTS ⇐396(6)—RAISING OF FEDERAL QUESTION ON REHEARING IN STATE COURT TOO LATE.

To give the national Supreme Court jurisdiction, under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), to review on writ of error the judgment of a state court, the essential federal question must have been especially set up there at the proper time and in the proper manner, and, being presented for the first time on petition for rehearing in the state Supreme Court, it came too late; that court not having entertained the petition and passed on the point, but having refused the petition, without more.

In Error to the Supreme Court of the State of Louisiana.



Suit by the Godchaux Company, Incorporated, against Albert Estopinal, Jr., Sheriff of the Parish of St. Bernard, and others. Judgment dismissing the petition was affirmed by the Supreme Court of Louisiana (142 La. 812, 77 South. 640), and plaintiff brings error. Dismissed.

Messrs. R. C. Milling and Robert E. Milling, both of New Orleans, La., for plaintiff in error.

Mr. Wm. Winans Wall, of New Orleans, La., for defendants in error.

\*180

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

By petition filed in the district court, St. Bernard parish, plaintiff in error sought to restrain collection of an acreage tax assessed against its lands not susceptible of gravity drainage. Invalidity of the tax was alleged upon the ground that no statute of Louisiana authorized it and also because its enforcement would produce practical confiscation and take property without due process of law contrary to the Fourteenth Amendment. Answering, defendant in error asked dismissal of the petition, claiming the tax was properly assessed and also that an amendment to article 281 of the Louisiana Constitution, adopted November, 1914, deprived the court of jurisdiction to entertain the contest. The trial court exercised jurisdiction, sustained the tax and dismissed the petition. Upon a broad appeal the Supreme Court, after declaring that the constitutional amendment deprived the courts of the state of jurisdiction over the controversy, affirmed the judgment of the trial court. 142 La. 812, 77 South. 640.

The record fails to disclose that plaintiff in error at any time or in any way challenged the validity of the state constitutional amendment because of conflict with the federal Constitution until it applied for a rehearing in the Supreme Court. That application was refused, without more. Here the sole error assigned is predicated upon such

supposed conflict; and, unless that point was properly raised below, a writ of error cannot bring the cause before us.

Such a writ only lies to review "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their

\*181

validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156, as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner, and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point. *Mutual Life Insurance Co. v. McGrew*, 188 U. S. 291, 308, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33; *St. Louis & San Francisco R. R. v. Shepherd*, 240 U. S. 240, 36 Sup. Ct. 274, 60 L. Ed. 622; *Missouri Pacific Ry. Co. v. Taber*, 244 U. S. 200, 37 Sup. Ct. 522, 61 L. Ed. 1082.

The writ of error is

Dismissed.

The CHIEF JUSTICE concurs in the result, solely on the ground that as the court below exerted jurisdiction and decided the cause—by the judgment to which the writ of error is directed—the contention that a federal right was violated by the refusal of the court to take jurisdiction is too unsubstantial and frivolous to give rise to a federal question.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

No. —. *G. T. BRYANT et al., petitioners, v. The UNITED STATES of America.* October 27, 1919. For opinion below, see 257 Fed. 378. Motion to direct clerk of the Circuit Court of Appeals to certify and forward the original transcript of record in this cause and that the clerk of this court be directed to file the petition for a writ of certiorari herein, denied.

No. —. *Arthur CRANE, petitioner, v. The UNITED STATES of America.* October 27, 1919. For opinion below, see 259 Fed. 480. Motion to direct clerk of the Circuit Court of Appeals to certify and forward the original transcript of record in this cause and the motion for leave to prosecute the cause in forma pauperis, denied.

(251 U. S. 539)

No. 103. The UNITED STATES of America, plaintiff in error, v. MILL CREEK & MINE HILL NAVIGATION & RAILROAD COMPANY to Use of PHILADELPHIA & READING RAILWAY COMPANY, lessee;

No. 104. The UNITED STATES of America, plaintiff in error, v. NORTH PENNSYLVANIA RAILROAD COMPANY to Use of PHILADELPHIA & READING RAILWAY COMPANY, lessee; and

No. 105. The UNITED STATES of America, plaintiff in error, v. DELAWARE & BOUND BROOK RAILROAD COMPANY to Use of PHILADELPHIA & READING RAILWAY COMPANY, lessee. December 8, 1919. In error to the District Court of the United States for the Eastern District of Pennsylvania. For opinion below, see 246 Fed. 1013. The Attorney General, for plaintiff in error.

PER CURIAM. Affirmed upon the authority of United States v. Larkin, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517.

Mr. Justice PITNEY took no part in the decision of these cases.

(251 U. S. 539)

No. 115. Jefferson C. POWERS et al., plaintiffs in error, v. The CITY OF RICHMOND. December 8, 1919. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 122 Va. 328, 94 S. E. 803. Mr. Robert H. Talley, of Richmond, Va., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Castillo v. McConnico, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622.

(251 U. S. 540)

No. 116. Sarah J. BRIGGS, administratrix, etc., plaintiff in error, v. UNION PACIFIC RAILROAD COMPANY. December 8, 1919. In error to the Supreme Court of the State of Kansas. For opinion below, see 102 Kan. 441, 175 Pac. 105. Mr. Joseph G. Waters, of Topeka, Kan., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 553)

No. 594. CHICAGO, DULUTH & GEORGIAN BAY TRANSIT COMPANY, owner of steamship "The SOUTH AMERICA," petitioner, v. Charles T. MOORE et al. December 8, 1919. For opinion below, see 259 Fed. 490. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(251 U. S. 553)

No. 595. The TOLEDO & CINCINNATI RAILROAD COMPANY et al., petitioners, v. The EQUITABLE TRUST COMPANY OF NEW YORK et al. December 8, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(251 U. S. 540)

No. —. Alexander BERKMAN v. A. CAMINETTI, Commissioner of Immigration, etc. December 11, 1919. Application for writ of error or appeal, for admission to bail and for a stay order, denied.

No. —. Emma GOLDMAN v. A. CAMINETTI, Commissioner of Immigration, etc. December 11, 1919. See also 251 U. S. 565, 40 Sup. Ct. 119, 64 L. Ed. —. Application for writ of error or appeal, application for bail and for a stay order, assigned for hearing on the 18th instant, and parties required to print and submit record as to habeas corpus and documents accompanying same, and a stay ordered until the application is disposed of and until further order of court.

(251 U. S. 564)

No. 245. Agnes SMEDLEY et al., appellants, v. Thomas D. McCARTHY, United States marshal, etc. December 11, 1919. Appeal from the District Court of the United States for the Southern District of New York. Messrs. Gilbert E. Roe and Charles Recht, both of New York City, for appellants. The Attorney General, for appellee. Dismissed with costs, on motion of counsel for appellants.

(251 U. S. 564)

No. 121. Charles A. HITCHCOCK, petitioner, v. Alfred G. SCATTERGOOD et al. December 15, 1919. On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see Appeal of Hitchcock, 249 Fed. 23, 161 C. C. A. 83. Mr. Horace L. Cheney, of New York City, for petitioner. Mr. Francis B. Bracken, of Philadelphia, Pa., for respondent. Dismissed per stipulation.

(251 U. S. 564)

No. 407. The BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, v. Joseph F. BAILEY. December 15, 1919. In error to the Supreme Court of the State of Ohio. For opinion below, see 124 N. E. 195. Messrs. Judson Harmon and George Hoadly, both of Cincinnati, Ohio, for plaintiff in error. Dismissed per stipulation.

(251 U. S. 553)

No. 583. Louis DRAGO, petitioner, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY. December 15, 1919. For opinion in Court of Errors and Appeals, see 106 Atl. 803. Mr. Alex. Simpson, of Jersey City, N. J., for petitioner. Messrs. McDermott & Enright, of Jersey City, N. J. (Mr. James D. Carpenter, Jr., of Jersey City, N. J., of counsel), for respondent. Petition for a writ of certiorari to the Circuit Court of Hudson County, State of New Jersey, denied.

(251 U. S. 553)

No. 590. The STATE OF WASHINGTON, petitioner, v. Isaac BELKNAP. December 15, 1919. For opinions below, see 104 Wash. 221, 176 Pac. 5, 182 Pac. 570. Messrs. L. L. Thompson, Atty. Gen., Glenn J. Fairbrook, Asst. Atty. Gen., and W. V. Tanner, of Seattle, Wash., for

petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(251 U. S. 549)

No. 592. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al., plaintiffs in error, v. Hannah L. ZUBER. December 15, 1919. Petition for a writ of certiorari herein granted.

(251 U. S. 554)

No. 605. Howard BROWN, petitioner, v. The UNITED STATES of America. December 15, 1919. For opinion below, see 257 Fed. 703. Messrs. James M. Blackford, of Libby, Mont., and R. P. Henshall, of San Francisco, Cal., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 554)

No. 606. REWARD OIL COMPANY, petitioner, v. PETROLEUM RECTIFYING COMPANY OF CALIFORNIA. December 15, 1919. For opinion below, see Petroleum Rectifying Co. of California v. Reward Oil Co., 260 Fed. 177. Mr. William K. White, of San Francisco, Cal., for petitioner. Messrs. Frederick P. Fish, of New York City, John H. Miller, of Marathon, N. Y., and J. H. Brickenstein, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 554)

No. 611. J. R. SMITH and B. J. Ostrander, petitioners, v. The Steamer J. J. HILL, etc. The PITTSBURGH STEAMSHIP COMPANY, claimant. December 15, 1919. For opinion below, see The J. J. Hill, 260 Fed. 655. Messrs. Harvey D. Goulder, of Cleveland, Ohio, and Charles E. Kremer, of Chicago, Ill., for petitioners. Messrs. Hermon A. Kelley and G. W. Cottrell, both of Cleveland, Ohio, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(251 U. S. 554)

No. 616. Emma Pell FETTERS, petitioner, v. The UNITED STATES of America. December 15, 1919. For opinion below, see 260 Fed. 142. Messrs. Bert Schlesinger, Edward F. Jared, and Marshall B. Woodworth, all of San Francisco, Cal., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for the United States.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 555)

No. 624. Will MAYNARD et al., petitioners, v. UNITED THACKER COAL COMPANY. December 15, 1919. For opinion below, see 262 Fed. 478. Mr. Ed. Noonchester, of Williamson, W. Va. (Mr. W. W. Scott, of Richmond, Va., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(251 U. S. 565)

No. —. Emma GOLDMAN v. A. CAMINETTI, Commissioner of Immigration, etc. December 18, 1919. See, also, 40 Sup. Ct. 118, 64 L. Ed. —. Mr. Harry Weinberger, of New York City, for petitioner. Leave granted to withdraw application for writ of error or appeal and for stay order and bail pending appeal, on motion of Mr. Harry Weinberger for Emma Goldman.

No. 245. Agnes SMEDLEY et al., appellants, v. Thomas D. McCARTHY, United States marshal, etc. December 19, 1919. See, also, 251 U. S. 564, 40 Sup. Ct. 118, 64 L. Ed. —. Messrs. Gilbert E. Roe and Charles Recht, both of New York City, for appellants. Mr. Solicitor General King, for appellee. Mandate granted on motion of Mr. Solicitor General King for the appellee.

(251 U. S. 555)

No. 505. Arthur C. GILSON and Thomas J. Duffy, petitioners, v. The UNITED STATES of America. December 22, 1919. For opinion below, see 258 Fed. 588. Mr. William A. Smith, for petitioners. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(251 U. S. 555)

No. 613. Charles F. GOODSPEED, petitioner, v. Herbert E. LAW. December 22, 1919. For opinion below, see 260 Fed. 497. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 555)

No. 617. Ellsworth J. TRADER, petitioner, v. The UNITED STATES. December 22, 1919. For opinion below, see 260 Fed. 923. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.



(251 U. S. 193)

## ST. LOUIS, I. M. &amp; S. RY. CO. v. UNITED STATES.

(Argued Nov. 12, 1919. Decided, Jan. 5, 1920.)

No. 71.

1. POST OFFICE 21(4)—GOVERNMENT MAY FREIGHT EMPTY MAIL BAGS AS REGARDING COMPENSATION FOR FUTURE MAIL CARRIAGE.

Empty mail bags, when being returned for further use, could, as provided by Act May 27, 1908, be withdrawn by the government from mail transportation and sent by freight or express as regards compensation for future carriage of mail; no law or contract requiring it to permit the weighing thereof as part of the mail in determining the compensation to be paid for carriage.

2. PUBLIC LANDS 85—EMPTY MAIL BAGS GOVERNMENT PROPERTY TO BE TRANSPORTED FREE UNDER LAND GRANT TO RAILROAD.

Empty mail bags, when withdrawn by the government from the mails pursuant to Act May 27, 1908, to be returned by freight for future use, were within Act Feb. 9, 1853, § 4, and Act July 28, 1866, § 1, providing that transportation of property of the United States over a railroad construction of which was aided by land grant shall be without charge.

3. PUBLIC LANDS 85—EMPTY MAIL BAGS NOT WITHIN ARMY TRANSPORTATION ACT.

Act June 30, 1882, as to rates of army transportation, has no application to transportation by freight of empty mail bags withdrawn from the mails for return for future use.

Mr. Justice McReynolds, dissenting.

Appeal from the Court of Claims.

Suit by the St. Louis, Iron Mountain & Southern Railway Company against the United States. Petition was dismissed (53 Ct. Cl. 45), and claimant appeals. Affirmed.

Mr. Benjamin Carter, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Frierson, for the United States.

\*202

\*Mr. Justice DAY delivered the opinion of the Court.

This case presents questions arising upon a suit brought by the railway company in the Court of Claims to recover compensation for the carriage of mail bags under facts found in the Court of Claims in the record sent up for our consideration. These facts are: That the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the State of Missouri, operated a line of railway between Tower Grove, Missouri, and Texarkana, in Arkansas. So much of the railway line as lies between Poplar Bluff, Missouri, and Texarkana, Arkansas, was aided in its construction by a grant of land from the United States by the Act of February 9, 1853 (10

Stat. 155, c. 59), and by the Act of July 28, 1866 (14 Stat. 338, c. 300).

The fourth section of the Act of February 9, 1853, provides:

"The said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

The first section of the Act of July 28, 1866, with respect to said railway provides:

"All property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the Government of the United States."

February 4, 1910, the Post Office Department transmitted to the claimant company a

\*203

distance circular which \*relates to mail transportation, the same was duly filled out and certified and returned to the Post Office Department. Between the 17th of February and the 1st day of June, 1910, the Post Office Department made the quadrennial weighing of mail in the weighing division which included the railway company's lines. Before this weighing of the mails, Congress passed the Act of May 27, 1908, 35 Stat. 412, c. 206, making appropriations for the Post Office Department, which provides:

"The Postmaster General shall require, when in freightable lots and whenever practicable, the withdrawal from the mails of all postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service except postage stamps, in the respective weighing divisions of the country, immediately preceding the weighing period in said divisions, and thereafter such postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment and other supplies for the postal service, except postage stamps, shall be transmitted by either freight or express."

Subsequent to the passage of the Act of May 27, 1908, the Post Office Appropriation Acts provided for specific sums for the payment of expressage on postal cards, stamped envelopes, newspaper wrappers and empty mail bags, and they carried similar provisions as to the withdrawal of said articles from the mails preceding weighing periods.

Before the weighing of the mails of the railway company the Postmaster General, acting under authority of the provisions of the Act of 1908, withdrew from the mail the empty mail bags, and the same were thereafter transported by freight over claimant's line of railway, and the weights were not included in estimating the weight of the mail carried during the contract term beginning July 1, 1910.

The findings give the number of pounds of empty mail \*bags withdrawn from the mails during the weighing season of 1910 and sent by freight to St. Louis from Texarkana, Arkansas, and Little Rock, Arkansas, and show that if these empty bags had not been so withdrawn and the weight thereof had been included with the weight of the mails, upon which compensation was based, the claimant would have received \$15,296.82 more than it did receive for service performed between July 1, 1910, and February 1, 1912.

During the period from July 1, 1910, to and including January 31, 1912, a total of 1,452,271 pounds of empty mail bags were transported over the railroad of the claimant in freight trains from Texarkana, Arkansas, to St. Louis, Missouri, for which service the claimant submitted bills at the published tariff rate against the United States amounting in the aggregate to \$14,043.17. In making settlement of these charges the Auditor for the Post Office Department made a deduction for the entire charge for the services performed from Texarkana, Arkansas, to Poplar Bluff, Missouri, amounting to \$8,251.45.

The sixth section of the Act of 1853 provides:

"The United States mail shall at all times be transported on the said road and branches, under the direction of the Post Office Department, at such price as Congress may by law direct."

And the thirteenth section of the Act of July 12, 1876 (19 Stat. 78, c. 179 [Comp. St. § 7485]) provides:

"That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only 80 per centum of the compensation authorized by this act."

The findings further state that ever since the passage of said last-mentioned act it has been the custom and practice of the Post Office Department to pay all the railroads

\*whose construction was aided by grants of land from the United States 80 per centum of the rate of compensation paid to nonland-aided roads for carrying the mails.

Claimant presented its bill for the transportation of said freight at the full commercial rate provided by the duly published and approved tariffs. In making settlement therefor, the Postmaster General made deduction of the entire charge between Texarkana, Arkansas, and Poplar Bluff, Missouri, and refused to pay anything therefor, on the ground that the railway company was obliged by the provisions of the Acts of 1853 and 1866 to transport said empty mail bags without cost or expense to the United States.

Upon these findings the Court of Claims decided against the claimant, and dismissed its petition. 53 Ct. Cl. 45.

Two questions are presented, which are thus stated in the opinion of the Court of Claims:

"(1) Could the empty mail bags be lawfully withdrawn from the mails merely for the purpose of reducing claimant's compensation for mail transportation service?

"(2) And assuming that said empty mail bags were lawfully withdrawn from the mails and shipped by freight, were they 'property' of the United States within the purview of the land grant acts of 1853 and 1866?"

[1] As to the first question there can be little difficulty. There was nothing in any law or contract of the Government which required it to permit the weighing of empty sacks or containers as part of the mail in determining the compensation to be paid for carrying the same. While, generally speaking, a bag or container in which letters or other mailable matter is carried is part of the mail, and collectively the containers might be considered as part of the mail essential to carry the mailable matter from one place to another, nevertheless there was nothing to prevent Congress, in fixing compensation for the carriage of the mails to expressly with-

\*206 draw therefrom the empty \*mail bags, and this it did by the Act of May 27, 1908, above quoted.

For the purposes of fixing compensation in the weighing of the mail Congress directed that the weight of the empty bags should be withheld in determining the average weight of the mails as the basis of fixing compensation. We agree with the Court of Claims that such action violated no contractual or other right of the claimant.

[2, 3] Concerning the other question presented there is perhaps more difficulty. By the sixth section of the Act of 1853 it was directed that the United States mail should be transported over the claimant's road at such prices as Congress may by law direct, and by the thirteenth section of the Act of July 12, 1876, railroads aided by grants of land made by Congress on condition that Congress should fix the basis of compensation for transportation of mails over its lines should receive 80 per centum of the compensation provided for in the act. These acts make specific reference to the amounts to be paid for the transportation of the mails. The payment provided in them is for the transportation of the mails which, it may be conceded, might include with the mail matter the bags in which the same was carried. However, by the Act of May 27, 1908, the Congress has classified empty mail bags with furniture and equipment and other supplies for the postal service, to be transported by freight or express. Congress thus undertook to make a separate provision covering the carrying of empty mail containers after they



had served their purpose of inclosing the mail matter during transportation.

It is insisted that the return of the empty mail bags is but part of the transportation of the mail. But certainly Congress might provide that empty mail bags should be differently treated than those used in the actual transportation of mailable matter. None will dispute that forwarding mail bags from their

\*207

place of manufacture to different points in the country for use would not constitute transportation of mail. We see no reason why Congress may not regard empty mail bags, being returned for further use, as no longer a part of the mails. Congress authorized contracts for the transportation of the mail, but by the Act of May 27, 1908, it withdrew empty mail bags from mail transportation and directed that they be sent by freight or express. How then was such transportation to be compensated? Ordinarily the applicable freight or express rates would control. But the acts of Congress which provided that property of the United States should be transported at the expense of the company were in full force and effect. It is said that in the report and action upon the legislation which took empty mail bags from carriage as part of the mails and directed the carriage by freight or express there is no intimation that the result of such legislation would have the effect of obtaining free transportation under the land grant acts, and that no such requirement is made in the act itself. But, Congress must be presumed to have known of its former legislation in the Acts of 1853 and 1866, and to have passed the new laws in view of the provisions of the legislation already enacted. These statutes must be construed together and effect given to all of them. Under the earlier acts this railroad in consideration of benefits received, was bound, when required, to transport troops and property of the United States free of charge.

We have here a question concerning the transportation of property of the United States. See *Southern Pacific Co. v. United States*, 237 U. S. 202, 204, 35 Sup. Ct. 573, 59 L. Ed. 916. The act of Congress providing for 50 per cent. rates concerns only "army" transportation and is not applicable to this case. See Act June 30, 1882, c. 254, 22 Stat. 120, 1 Supp. Rev. Stats. 375, 376. The empty mail bags were property, and belonged to the United States. When the Government required their transportation by freight, the

\*208

former legislation which accompanied the grant of lands to this railway company controlled the terms of carriage.

We find no error in the judgment of the Court of Claims, which was also the conclusion of the Comptroller of the Treasury, 17 Comp. Dec. 749.

Affirmed.

Mr. Justice McREYNOLDS, dissenting.

Appellant's right to recover seems quite plain to me.

The Act of February 9, 1853, ch. 59, 10 Stat. 155, granted lands afterwards used to aid in constructing appellant's lines. Section 4:

"\* \* \* The said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

#### Section 6:

"That the United States mail shall at all times be transported on the said road and branches, under the direction of the Post Office Department, at such price as Congress may by law direct."

The Act of July 28, 1866, ch. 300, 14 Stat. 338, among other things, revived and extended the Act of 1853. Section 1:

"\* \* \* And provided further, that all property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the Government of the United States."

And thus it appears that one section of the statutes directs free transportation of "all property and troops of the United States" and a wholly different section requires transportation of the United States mail "under the direction of the Post Office Department, at such price as Congress may by law direct."

Through the Post Office Department, the

\*209

United States are engaged in handling the mails for pay. Their transportation is part of a well-defined business. In the orderly course and as an essential part of that business emptied sacks are constantly being returned for further use. They are property of the United States in a certain sense, whether full or empty; and they are elements of the mail whether going out or coming back.

A clear distinction between property of the United States and United States mail is preserved by the very language of the land grant statutes; and, I think, Congress had no purpose—if, indeed, the power—to convert mail into property within the meaning of these statutes simply by directing carriage of the former in freight trains. The purpose was to secure transportation at less than former cost, and to such end Congress, in effect, commanded that emptied bags, a portion of the mails for which rapid movement is not essential, "shall be transmitted by either freight or express" and compensation made according to the ordinary rates. Under this interpretation, the railroad would suffer no oppressive burden and contemplated economies would be effectuated.



(251 U. S. 192)

## CITY OF WINCHESTER et al. v. WINCHESTER WATERWORKS CO.

(Argued Oct. 24, 1919. Decided Jan. 5, 1920.)

No. 51.

WATERS AND WATER COURSES  $\hookrightarrow$  203(6)—CITY NOT GRANTED NECESSARY AUTHORITY TO REGULATE RATES OF WATER COMPANY.

Legislative authority necessary for a city, independently of reservation of right in franchise for use of streets, to regulate rates of a water company, *held* not granted by Ky. St. § 3490, subsec. 25, providing that a city of the fourth class may grant right of way over streets to a street railway company, on conditions deemed proper, and may regulate the fares on street cars, and under like condition may grant right of way for water companies, nor by subsections 8, 30.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Suit by the Winchester Waterworks Company against the City of Winchester and others. From an adverse decree, defendants appeal. Affirmed.

Messrs. J. Smith Hays, of Winchester, Ky., and T. L. Edelen, of Frankfort, Ky., for appellants.

\*193

\*Mr. Beverly R. Jouett, of Winchester, Ky., for appellee.

Mr. Justice DAY delivered the opinion of the Court.

The Winchester Waterworks Company filed its bill in the United States District Court for the Eastern District of Kentucky, seeking to enjoin the enforcement of an ordinance establishing maximum rates for water to be furnished the city for public use and to the people thereof for private use. By the bill and amended bill it was charged that the city had no authority to pass or enforce an ordinance fixing such rates, because (1) no power had been granted to the city so to do by the Legislature of Kentucky; (2) because the rates established were so low as to be confiscatory in their character, and, consequently, the ordinance was violative of rights secured to the company by the Fourteenth Amendment to the federal Constitution. An answer was filed, and the court decided the case and made a final decree in favor of the company upon the ground that under the laws of Kentucky the city had no authority to pass or enforce an ordinance fixing rates. The court found it unnecessary to pass upon the question of the confiscatory character of the rates. The bill invoked jurisdiction upon a constitutional ground, and the case was brought here by direct appeal.

It appears that the company had a contract with the city, which expired in 1916, and thereafter the ordinance in controversy

was passed. That a city has no power to regulate rates of this character unless it has legislative authority so to do is established, and does not seem to be disputed by the appellant. "Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water,

\*194

lighting or \*other public service corporations in the absence of express or plain legislative authority to do so." 3 Dillon on Municipal Corporations (5th Ed.) § 1325. Nor does such authority arise from the power to regulate the opening and use of streets, nor a grant of the general right to control and regulate the right to erect works and lay pipes in the streets of the city. *State v. Missouri & K. Telephone Co.*, 189 Mo. 83, 88 S. W. 41; *Jacksonville v. Southern Bell & Tel. Co.*, 57 Fla. 374, 49 South. 509; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; *Mills v. Chicago (C. C.)* 127 Fed. 731; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

Bearing this general principle in mind, we come to examine the sections of the laws of Kentucky which, it is insisted, give the authority to fix water rates. The appellant insists that this power is expressly conferred in subsection 25 of section 3490 of the Kentucky Statutes, which reads as follows:

"The board of council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any or all street crossings, and to prevent railways from blocking or obstructing the streets or public ways of the city, and to fix penalties for the violation of these provisions: Provided," etc.

Other subsections claimed to be applicable are given in the margin.<sup>1</sup>

<sup>1</sup> Kentucky Statutes:

"3490. The board of council, in addition to other powers herein granted, shall have power within the city: \* \* \*

"(8) To provide the city with water, or erect, purchase, or lease waterworks and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire plugs and pumps in the streets within or beyond the limit of the city. \* \* \*

"(30) The board of council shall have power, by ordinance, to prescribe the punishment, by fine not exceeding \$100, or imprisonment not exceeding 60 days of any person who shall molest, damage or interfere with any system of waterworks laid in said city, or the pipes and mains, hydrants, or any

\*195

\*Examining subsection 25, we are unable to discover any grant of authority to fix the rates for water consumption. It is therein first provided that the council may grant the right of way over the public streets to any railroad or street railroad company on such conditions as to the council may seem proper, and shall have a supervising control over the use of the same, and the council is given the right to regulate the speed of cars and signals and fare on street cars, and under like conditions and supervision, the council may grant the right of way to water companies among others. This language is certainly very far from that express authority to regulate rates, which is essential in order to enable municipalities so to do. The power to grant a right of way to water companies is specifically granted, and this under like conditions and supervision already provided

\*196

as to railroad and street \*railroad companies. This is the full measure of the grant of authority to deal with water companies. The right to regulate fares is in the same sentence which grants authority to deal with water companies, and is specifically limited to fares on street cars.

Nor do we find in other subsections of this section any provision from which the right to fix the rates of water companies can be inferentially deduced.

Counsel call to our attention but one case from Kentucky, whose court of last resort is final authority upon the construction of the statutes, and that is *United Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34, 166 S. W. 783. There the *United Fuel & Gas Company* held a franchise from a city in Kentucky under an ordinance providing that the grantee of the franchise should furnish for public and private use for the city and its inhabitants natural and artificial gas at a reasonable price not exceeding in any event \$1 per 1,000 cubic feet, and that the grantee in delivering gas should not discriminate against the consumers in the city. The company proposed to sell gas to the inhabitants of the city at 20 cents per thousand feet if they would sign a contract for five years, but it charged persons who did not sign such a contract 25 cents a thousand feet. The

part thereof, and shall have power to punish by ordinance and impose the same penalty as for damaging or molesting any other public property, and may, subject to the rules of any water company which may establish such system, select persons who shall have the right to open, tap or make connection with such pipes or mains in streets, alleys, or public ways of said city. \* \* \*

"(33) Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said board of council may change the boundary line of any ward or wards of any city now divided into wards, or hereafter divided into wards, under the provision of this act, not less than sixty days previous to any November election."

city council passed an ordinance providing that a gas company should not charge one citizen more than another, and imposed a fine for violation of the ordinance. The city was of the fifth class, and was given authority to make "all other local police, sanitary and other regulations, not conflicting with the general laws." The court held that the act for the government of this city of the fifth class must be read in connection with the statutes conferring power on larger cities, and, that thus construed, there was no grant of authority to the city to impose a fine such as the one in question in the absence of legislative authority so to do. The section from *Dillon on Municipal Corpora-*

\*197

\*tions, stating that the authority of a municipality to regulate rates to be charged by public service corporations is limited to cases in which express or plain legislative authority has been given was quoted with approval. Cases from other states in which the principle has been approved were also cited.

It is true that this case is not precisely in point, but it contains a recognition by the Court of Appeals of Kentucky of the accepted principle that the right to fix rates must be granted to municipal corporations by a plain expression of legislative authority. It is said, however, that our decision in *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 24 Sup. Ct. 82, 48 L. Ed. 217, holds a contrary view. So far as apposite, that case dealt with the power of a city of the third class to fix rates for water consumers. As to cities of that class, section 3290 of the Kentucky statutes specifically provides authority to provide the city and inhabitants thereof with water, light, etc., service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the price to consumers and customers. Dealing with that section, and the authority conferred upon cities of the third class, this court said:

"The purpose of section 3290 was to provide the inhabitants of cities of the third class with the services mentioned—water, light, power, heat and telephone. They could be provided by the cities directly or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power."

This language was used in regard to the authority given in express terms to fix rates. It was said of such authority that it was but the endowment of a common governmental power. This is undoubtedly true. But it is equally certain that the governmental power rests with the state, and must be con-

\*198

ferred upon the municipality \*in an unmistakable way. We find nothing in the *Owensboro Case* which at all conflicts with the



construction which we have given to section 3490, applicable to cities of the fourth class to which the city of Winchester belongs.

Finding no error in the judgment of the District Court, the same is  
Affirmed.

(251 U. S. 233)

HAYS v. PORT OF SEATTLE et al.

(Argued Nov. 12, 1919. Decided Jan. 5, 1920.)

No. 70.

1. COURTS  $\S$ 299—FEDERAL DISTRICT COURT HAS JURISDICTION UNDER BILL SHOWING CONTROVERSY UNDER NATIONAL CONSTITUTION.

The averments of the bill setting up alleged obligations of complainant's contract with the state, and the contention that they were impaired by a state statute, presented a controversy under the national Constitution, and (enough being involved) conferred jurisdiction on the federal District Court, irrespective of citizenship of the parties.

2. COURTS  $\S$ 385(7)—CONTROVERSY UNDER NATIONAL CONSTITUTION PERMITS DIRECT APPEAL FROM DISTRICT COURT TO SUPREME COURT.

The bill in a federal District Court claiming that a state statute violated the national Constitution warranted a direct appeal to the Supreme Court, under Judicial Code,  $\S$  238 (Comp. St.  $\S$  1215).

3. CONSTITUTIONAL LAW  $\S$ 121(1)—STATUTE GIVING MUNICIPALITY TITLE TO WATERWAY NOT IMPAIRING OBLIGATION OF CONTRACT WITH STATE TO EXCAVATE IT.

Laws Wash. 1913, p. 195, vacating part of a waterway and conferring the title on a municipality, did not impair the obligation of complainant's contract with the state to excavate it; but its obligation remained as before, and formed the measure of his right to recover from the state for damages.

4. CONSTITUTIONAL LAW  $\S$ 280—PROVISION FOR ASCERTAINING AND PAYING COMPENSATION AFTER TAKING FOR PUBLIC PURPOSE DUE PROCESS.

Laws Wash. 1913, p. 195, vacating part of a waterway and conferring title on a municipality, did not deprive complainant, who had contract with the state to excavate it, of property without due process of law, as, if he had any property rights which were thereby taken, the taking was for a public purpose, and Rem. & Bal. Code Wash.  $\S\S$  886-890, as to remedy of persons having claims against the state, furnished adequate provision for compensation; the requirement of due process of law being satisfied by ascertainment of compensation after taking.

5. COURTS  $\S$ 347—BILL IN FEDERAL COURT MUST EXCUSE LACHES.

In the equity practice of the federal courts, excepted from the Conformity Act by Rev. St.  $\S\S$  913, 914 (Comp. St.  $\S\S$  1536, 1537), laches need not be set up by plea or answer, but

the bill must excuse the delay in seeking equity relief; otherwise, complainant's laches may be taken advantage of by demurrer or on final hearing.

Appeal from the District Court of the United States for the Western District of Washington.

Suit by William F. Hays against the Port of Seattle and others. From a decree dismissing the bill (226 Fed. 287), complainant appeals. Affirmed.

Mr. William F. Hays, of Seattle, Wash., pro se.

Messrs. L. T. Turner, C. E. Claypool, and Harold Preston, all of Seattle, Wash., for appellees.

\*234

\*Mr. Justice PITNEY delivered the opinion of the Court.

Appellant filed his bill in equity for an injunction to restrain the enforcement of an act of the Legislature of the state of Washington, approved March 11, 1913 (Sess. Laws, p. 195), entitled "An act vacating a portion of Smith's Cove waterway, in the city of Seattle, and vesting the title of the vacated portion in the port of Seattle," upon the ground (a) that it impaired the obligation of an existing contract between him and the state, in violation of section 10 of article 1 of the Constitution of the United States; and (b) that it deprived him of property without due process of law, contrary to section 1 of the Fourteenth Amendment. The District Court on final hearing dismissed the bill (226 Fed. 287), and the case is brought here by direct appeal under section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St.  $\S$  1215]), because of the constitutional questions.

The facts, shortly stated are as follows: Under an act of the Legislature approved March 9, 1893 (Sess. Laws, p. 241), which made provision for the excavation by private contract of waterways for the uses of navigation, complainant and another party to whose rights he has succeeded obtained a contract with the state, acting by the Commissioner of Public Lands, which was approved by the Governor on March 7, 1896. It provided for the excavation by complainant of Smith's Cove waterway, in Seattle Harbor, extending from the outer harbor line through the intervening tide lands to the head of Smith's Cove, the excavated material to be used for filling in and raising above high tide the adjacent tide and shore lands belonging to the state of Washington. For doing this he was to be entitled to compensation equivalent to the cost of the work plus 15 per centum and interest, for which he was to have a lien upon the tide and shore lands so filled in. The state agreed to



hold these lands subject to the operation of

\*235

the contract pending its execution, and \*subject to the ultimate lien of the contractor thereon, and that it would perform by its authorized agents all things required by the act of 1893 to be performed by the state. The contract provided for and specified the character of the bulkheads and retaining walls to be used, reserving, however, to the Commissioner of Public Lands the right to modify these plans and specifications as to "shape, form, and character of material" as might appear necessary. The contract required complainant at his own cost to excavate also a waterway to extend from the north end of the Smith's Cove waterway across the peninsula separating the cove from Salmon Bay, such excavation to be made under the direction and in accordance with the plans of an engineer to be designated by the Governor of the state or the Secretary of War of the United States, and when excavated to be owned, possessed, and controlled by the United States or by the state, free of cost to them, if the right of way and the privilege of excavating across the peninsula should be accorded to the contractor free of cost or if fair compensation should be made to him therefor. Work was to be commenced within 60 days and completed within 2 years from the date of approval.

On May 4, 1896, complainant entered upon performance of the contract and commenced driving piles for the construction of a bulkhead. Almost immediately he was notified by the Commissioner of Public Lands that the latter elected to exercise the right, as provided by the contract, to change the form of bulkhead. This had the effect of requiring a suspension of work until modified plans and specifications for the bulkheads should be prepared. Complainant did suspend the work, and it never was resumed thereafter. There were negotiations and correspondence between him and the Commissioner of Public Lands looking to the preparation of the modified plans and specifications, but they result-

\*236

ed in nothing. \*Each party seems to have insisted that it was the duty of the other to furnish them.

Complainant contends that he was at all times ready and prepared to carry out the contract on his part, but was prevented from doing so by acts and omissions of the state and its representatives, including the failure to furnish plans for the modified form of bulkhead and a failure to furnish complainant with a right of way across the peninsula between the head of Smith's Cove and Salmon Bay. Defendants contend that repeatedly, and in particular in the month of November, 1898, complainant was notified that his plans were wholly inadequate and would be insufficient for the purpose for which the retaining wall was designed, and that on the

latter occasion he was notified to submit proper plans and specifications and to commence operations within ten days after their approval.

While the excavation project thus remained in suspense, and pursuant to an act authorizing establishment of port districts, approved March 14, 1911 (Sess. Laws, p. 412), the port of Seattle was established as a municipal corporation with territorial limits including Smith's Cove waterway, Salmon Bay, and the intervening peninsula. This act conferred extensive powers for the regulation, control, and improvement of the harbor and navigable and nonnavigable waters within such district, in the interest of the public.

Thereafter, by the statute that is now under attack (Sess. Laws 1913, p. 195) it was enacted that the northerly part of the Smith's Cove waterway should be vacated and the title thereto vested in the port of Seattle. Complainant was fully advised of this legislative measure, even prior to its enactment.

After it took effect, which was in June, 1913, the port commission took possession of the waterway, exercised control over it, and

\*237

did a considerable amount of excavation, filling, and bulkhead construction, having spent large sums of money therein between the taking effect of the act and November 14, 1914, when the bill of complaint was filed.

[1, 2] Coming to the questions raised upon the present appeal: The averments of the bill setting up the alleged obligations of complainant's contract with the state, and the contention that they were impaired by the act of 1913, presented a controversy under the Constitution of the United States, and (a sufficient amount being involved) conferred jurisdiction upon the federal court irrespective of the citizenship of the parties, and at the same time warranted a direct appeal to this court under section 238, Judicial Code. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

The merits remain for determination.

[3] Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the state and one that impairs its obligation. Had the Legislature of Washington, pending performance or after complete performance by complainant, passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation. The legislation in question had no such purpose or effect. It simply, after 17 years of delay without substantial performance of the contract, provided that the project should be abandoned and title to the

public lands turned over to the municipality. Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before, and formed the measure of his right to recover from the state for the damages sustained. *Brown v. Colorado*, 106 U. S. 95, 98, 1 Sup. Ct. 175, 27 L. Ed. 132; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148-150, 21 Sup. Ct. 575, 45 L. Ed. 788; *Dawson*

\*238

*v. \*Columbia Trust Co.*, 197 U. S. 178, 181, 25 Sup. Ct. 420, 49 L. Ed. 713; *Lord v. Thomas*, 64 N. Y. 107; *Caldwell v. Donaghey*, 108 Ark. 60, 64, 156 S. W. 839, 45 L. R. A. (N. S.) 721, Ann. Cas. 1915B, 133.

[4] We deem it clear also that the act of 1913 had not the effect of depriving complainant of property without due process of law, in contravention of the Fourteenth Amendment. Assuming he had property rights and that they were taken, it clearly was done for a public purpose, and there was adequate provision for compensation in sections 886-890, Rem. & Bal. Code of Washington, which entitle any person having a claim against the state to begin an action thereon in a designated court upon the mere giving of security for costs, whereupon service of the complaint is to be made upon the Attorney General and secretary of state, the action is to proceed in all respects as other actions, with a right of appeal to the Supreme Court, and, in case of a final judgment against the state, a transcript of it is to be furnished to the auditor of state, who is required thereupon to "audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury." If his claim has not been barred by limitation of time, this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking. *Bragg v. Weaver*, 251 U. S. 57, 40 Sup. Ct. 62, 64 L. Ed. —, decided December 8, 1919.

[5] The District Court, besides finding complainant's case to be otherwise without merits, held in effect that he was barred from relief in equity by laches, because after the taking effect of the act of 1913 he stood by for more than a year and permitted the port commission to enter upon extensive improvements and expend large moneys on the waterway and adjoining lands, before he began his suit. The only answer made to this is that the defense of laches was not pleaded.

\*239

But in the equity practice of the courts \*of the United States (excepted from the Conformity Act, see Rev. Stat. §§ 913, 914 [Comp. St. §§ 1536, 1537]), laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of

courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused his laches may be taken advantage of either by demurrer or upon final hearing. *Maxwell v. Kennedy*, 8 How. 210, 222, 12 L. Ed. 1051; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. Ed. 836; *Marsh v. Whitmore*, 21 Wall. 178, 185, 22 L. Ed. 482; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S. 806, 811, 24 L. Ed. 324; *National Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Hammond v. Hopkins*, 143 U. S. 224, 250, 12 Sup. Ct. 418, 36 L. Ed. 134; *Gallagher v. Cadwell*, 145 U. S. 368, 371-373, 12 Sup. Ct. 873, 36 L. Ed. 738; *Hardt v. Heidweyer*, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548; *Abraham v. Ordway*, 158 U. S. 416, 420, 15 Sup. Ct. 894, 39 L. Ed. 1036; *Willard v. Wood*, 164 U. S. 502, 524, 17 Sup. Ct. 176, 41 L. Ed. 531; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 680, 696-698, 18 Sup. Ct. 223, 42 L. Ed. 626.

Decree affirmed.

(251 U. S. 221)

## UNITED STATES v. POLAND et al.

(Argued Nov. 19, 1919. Decided Jan. 5, 1920.)

No. 29.

1. PUBLIC LANDS — 120 — ALLEGATION IN SUIT TO CANCEL PATENT AS PROCURED BY FRAUD NOT SUSTAINED BY AFFIDAVIT FILED TO PROCURE PATENT.

In suit to cancel a patent for Alaskan lands, the allegation of the complaint that patent was fraudulently procured, in that among the proofs presented to the land officers was an affidavit falsely representing that the two tracts to be patented were more than 80 rods apart, when in truth they were adjoining tracts, cannot be considered, where the words of the affidavit set forth do not sustain the pleader's conclusion as to what was represented, and the complaint makes it certain the application for patent and other entry papers disclosed the tracts were contiguous.

2. PUBLIC LANDS — 35(2) — ENTRY OF ALASKAN LANDS UNDER SOLDIERS' ADDITIONAL RIGHTS VIOLATIVE OF STATUTE.

In view of the circumstances in which the provision was incorporated in Act Cong. March 3, 1903 (Comp. St. § 5046), amending Act Cong. May 14, 1898, extending the homestead laws to Alaska, and providing that no more than 160 acres shall be entered in any single body by means of soldiers' additional homestead



rights, it is in contravention of the provision to make separate entries of lands in point of contiguity and compactness constituting a single body of 319.75 acres, where both entries are by the same person and are based upon soldiers' additional homestead rights.

**3. PUBLIC LANDS**  **120—CANCELLATION OF PATENT GRANTED EXCEPT AS AGAINST BONA FIDE PURCHASER.**

Where a second patent to Alaskan lands was issued by the land officers in violation of law, the United States government is entitled to demand that it be canceled unless a successor of the patentee is a bona fide purchaser.

**4. PUBLIC LANDS**  **120—BURDEN OF PROOF OF AFFIRMATIVE DEFENSE OF BONA FIDE PURCHASER IN SUIT TO CANCEL PATENT ON DEFENDANT.**

In suit by the United States government to cancel patent to public lands as issued in violation of law, the defense of bona fide purchaser is affirmative, and must be set up and established by such purchaser.

**5. PUBLIC LANDS**  **130—PATENTEE AFTER CANCELLATION CAN ASK REPAYMENT OR EXERCISE HIS RIGHTS TO PATENT.**

If a patent to public lands is canceled, the patentee or his assignee will be free to exercise the rights with which the patent was obtained, and also to ask repayment, under Act Cong. June 16, 1880 (Comp. St. §§ 4595-4598), of the fees and commissions paid to the land officers.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against William B. Poland and another to cancel patent for lands issued to Poland and to cancel deed from Poland to Frederick William Low conveying the lands. Decree dismissing the bill, on demurrer (231 Fed. 810, 145 C. C. A. 630), and the United States brings certiorari. Reversed.

Mr. Assistant Attorney General Nebeker, for the United States.

**\*222**

\*Messrs. Ira Bronson, of Seattle, Wash., and George H. Patrick, of Washington, D. C., for respondents.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to cancel a patent issued to William B. Poland for one hundred and sixty acres of land in Alaska, the gravamen of the complaint being that by this and another patent, both based upon soldiers' additional homestead rights, Poland acquired a single body of land of larger acreage than was permitted by the statute under which the patents were sought and issued. The defendants, who were the patentee and another claiming under him, separately demurred to the complaint, and the court sustained the demurrers and dismissed the suit. That decision was affirmed by the Circuit Court

of Appeals, one judge dissenting, 231 Fed. 810, 145 C. C. A. 630, and the case is here on writ of certiorari.

Of course, it rested with Congress to determine whether, when, and with what restrictions the general land laws should be extended to Alaska. For many years there was no affirmative action upon the subject. The first steps consisted of limited extensions of the laws relating to mining claims, Act May 17, 1884, c. 53, § 8, 23 Stat. 24, 26, and Town Sites Act March 3, 1891, c. 561, § 11,

**\*223**

\*26 Stat. 1095, 1099 (Comp. St. § 5079); but with these we are not now concerned. The homestead laws were the next to receive attention. By the Act of May 14, 1898, c. 299, 30 Stat. 409, they were extended to that district with the restrictions (a) that "no homestead" should exceed eighty acres in extent, and (b) that "no entry" should extend more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. And by the amendatory Act of March 3, 1903, c. 1002, 32 Stat. 1028 (Comp. St. § 5046), the extension of the homestead laws was repeated and confirmed, but with the qualifications (a) that an *actual settler* intending to comply with the requirements in respect of continued residence, cultivation, etc., should be entitled to enter three hundred and twenty acres or a less quantity, (b) that "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights, and (c) that "no entry" should extend more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. Further restrictions were imposed, but there is no present need for noticing them.

The controversy here is over the meaning and purpose of the provision that no more than one hundred and sixty acres shall be entered in any single body by means of soldiers' additional homestead rights.

The material facts to be gathered from the complaint are these: Poland, who was the assignee of certain soldiers' additional homestead rights entitling their owner to enter and acquire in the aggregate 319.75 acres, wished to use them in entering and acquiring certain land in Alaska. The regular public surveys had not been extended to that locality, so he caused a special survey of the land to be made at his expense, as was permitted

**\*224**

by applicable \*regulations. 32 Land Dec. 424; 28 Land Dec. 149. By that survey the land, which was in a compact or single body, was divided into two tracts—one of 159.75 acres, designated as survey No. 241, and the other of 160 acres, designated as survey No. 242. As surveyed the north boundary of one tract



was the south boundary of the other, and this was shown in the surveyor's return. On April 26, 1906, after the survey, he presented at the local land office two applications whereby he sought to make separate entries of the two tracts with his soldiers' additional rights—some of the rights being used on one tract and the others on the other tract. The applications were approved and passed to entry and patent—the patent for the 160 acres being issued a considerable period after the other.

In these circumstances the complaint charges that the 319.75 acres, although surveyed in the form of two tracts, were but a single body of land in the sense of the provision in question; that the land officers in passing both applications to entry and patent acted upon a misconception of the law and of their authority; and that in consequence the later patent, whereby Poland's acquisition was made to exceed one hundred and sixty acres in a single body, was issued in violation of law and should be canceled.

[1] The complaint also contains an allegation that that patent was fraudulently procured in that among the proofs presented to the land officers was an affidavit falsely representing, in effect, that the two tracts were more than eighty rods apart, when in truth they were adjoining tracts. But this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that the application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary one-half mile in length.

#### \*225

\*In approaching the consideration of the provision whose meaning and purpose are in question, it is well to recall what soldiers' additional homestead rights are and what use could be made of them outside Alaska when the provision was adopted. They are rights to enter and acquire unappropriated nonmineral public land without settlement, residence, improvement, or cultivation, and without payment of any purchase price. They are not personal to the original beneficiaries but are transferable at will, and the number that may be assigned to the same person is not limited. A single right is always for less, and generally much less, than one hundred and sixty acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon the use of such rights outside Alaska. Indeed, the only restriction of any moment was one, uniformly respected, preventing the inclusion of more than one hundred and sixty acres in a single entry. But the number of such entries that might be made by the same person was not restricted, nor was there any limi-

tation upon the amount of land in a single body that might be entered in that way. Thus an assignee having rights aggregating six hundred and forty acres could use them in entering that amount of land in a compact body one mile square, if only he did so through four entries of one hundred and sixty acres each. And, if he had rights the aggregate of which was sufficient, he could in a like way enter a body of land three miles square or even an entire township. See Rev. Stat. §§ 2289, 2304, 2306 (Comp. St. §§ 4530, 4592, 4594); Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179; Diamond Coal Co. v. United States, 233 U. S. 236, 243, 34 Sup. Ct. 507, 58 L. Ed. 936; Robinson v. Lundrigan, 227 U. S. 173, 178, 179, 33 Sup. Ct. 255, 57 L. Ed. 468; 3 Land Dec. 472; Edgar Boice, 29 Land Dec. 599, and Edgar O'Keefe, Id., 643; 30 Land Dec. 285; 31 Land Dec. 441; 32 Land Dec. 418; Ole B. Olsen, 33 Land Dec. 225; 45 Land Dec. 236, par. 3; General Circular of 1904, pp. 11, 26-28.

[2] With this understanding of the circum-

#### \*226

stances in which \*the provision was incorporated into the Act of 1903 extending the homestead laws to Alaska, we think the meaning and purpose of the provision are manifest. It is in form a proviso and says "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights. A purpose to prevent the use of these rights in entering a large acreage in a single body hardly could be more plainly expressed. There is nothing in the provision indicating that it is concerned merely with what may be taken by a single entry; and to construe it in that way would make it practically useless, for a large acreage in a single body still could be taken by merely resorting to two or more entries. Besides, the amount of land that could be taken by a single entry had long been limited to one hundred and sixty acres, and of course to say that no greater amount should be taken in a single body by a single entry would add nothing to that limitation. But the provision does not speak of a single entry but only of the amount that may be "entered in any single body," and if it is to have any real effect it must be construed according to the natural import of its words; that is to say, as limiting the amount of land in a compact or single body that may be entered by means of soldiers' additional homestead rights, whether the entering be by one or several entries. We conclude therefore that the provision, while leaving one who holds several rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than one hundred and sixty acres in a compact or single body.

The court in Alaska regarded the provision as sufficiently like that relating to the area of placer mining claims (Rev. Stat. §§ 2330,

2331 [Comp. St. §§ 4629, 4630]) to require that it be similarly construed. But we think there is a marked difference between the two provisions. That in the placer mining law says "no location" shall exceed a prescribed

\*227

area and it means, as the statute otherwise shows, that no single location shall include more.

The Circuit Court of Appeals was of opinion that—

"What the statute was seeking to protect was the shores of the navigable waters of Alaska and not to prohibit the entry of a tract of more than 160 acres."

In this the court apparently confused the present provision, which operates in the same way in all parts of Alaska, with another and wholly distinct provision, which relates only to entries along the shore. Their independence and the subjects to which they relate are best shown by quoting both in the order in which they appear in the statute, which we do:

"And provided further that no more than one hundred and sixty acres shall be entered in any single body by \* \* \* soldier's additional homestead right."

"Provided, that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

There is in this case no question as to what distance along the shore an entry may extend, or as to what space shall be reserved between claims along the shore, but only a question as to whether making separate entries of lands which in point of contiguity and compactness constitute a single body of 319.75 acres is in contravention of the provision first quoted, where both entries are by the same person and are based upon soldiers' additional homestead rights. That question we answer in the affirmative for the reasons before indicated.

[3, 4] It follows that, if the facts be as alleged in the complaint, the second patent was issued in violation of law and the Government is entitled to demand that it be canceled, unless, as is asserted in the brief for the defendants, one of them is a bona fide purchaser. The complaint does not show that he is such, and the rule is that this is an

\*228

\*affirmative defense, which he must set up and establish. *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 403, 35 Sup. Ct. 339, 59 L. Ed. 637; *Great Northern Ry. Co. v. How-er*, 236 U. S. 702, 710, 35 Sup. Ct. 465, 59 L. Ed. 798.

[5] If the patent is canceled, Poland, or his assignee, will be free to exercise the rights with which the patent was obtained (see *Harlan Cole*, 6 Land Dec. 290, and *John E. Court-*

right, *Id.*, 459), and also to ask repayment under the Act of June 16, 1880, c. 244, 21 Stat. 287 (Comp. St. §§ 4595-4598), of the fees and commissions paid to the land officers.

Decree reversed.

(Ct. Cl. S. 259)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

(Submitted Dec. 18, 1919. Decided Jan. 5, 1920.)

No. 118.

1. COMMERCE ⇐8(6) — INAPPLICABILITY OF COMPENSATION ACT TO INJURY IN INTERSTATE COMMERCE.

If the work in which a railroad's electric lineman was engaged when he received a fatal electric shock was part of interstate commerce, the Workmen's Compensation Act of the state is inapplicable.

2. COMMERCE ⇐27(5)—INJURY IN INTERSTATE COMMERCE NECESSARY TO RELIEF UNDER FEDERAL LIABILITY ACT.

Generally, when the applicability of the federal Employers' Liability Act (Comp. St. §§ 8657-8665) is uncertain, the character of the employment in relation to commerce may be adequately tested by inquiring whether the employé when injured was engaged in work so closely connected with interstate transportation as practically to be a part of it.

3. COMMERCE ⇐27(8) — EVIDENCE SHOWING INJURY TO LINEMAN IN INTERSTATE COMMERCE.

Where a railroad's electric lineman, when he sustained a fatal shock, was wiping insulators supporting a wire carrying electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly, the work was directly connected with interstate transportation as an essential part, and the federal Employers' Liability Act, not the state Workmen's Compensation Act, governed the case and the rights of the lineman's dependents.

Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the Supreme Court of the State of California.

Application for compensation by the dependents of Wm. T. Butler, opposed by the Southern Pacific Company, the employer. To review award of the Industrial Accident Commission, the employer petitioned for certiorari to the Supreme Court of the State of California, which affirmed the award (171 Pac. 1071), and the employer brings certiorari. Judgment in the Supreme Court of California reversed, and cause remanded for further proceedings.



Messrs. Henley C. Booth and William F. Herrin, both of San Francisco, Cal., for petitioners.

Messrs. Christopher M. Bradley and Warren H. Pillsbury, both of San Francisco, Cal., for respondent.

\*262

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

William T. Butler, husband of respondent Mary E. Butler, was killed at Oakland, California, while employed by the Southern Pacific Company as an electric lineman. The Supreme Court of the State affirmed an award rendered by the California Industrial Commission against the company, and the cause is properly here by writ of certiorari.

[1] The fatal accident, which occurred June 21, 1917, arose out of and happened in the course of deceased's employment. He "received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death." At that time the company a common carrier by railroad, maintained a power house at Fruitvale, California, where it manufactured the electric current which moved its cars engaged in both interstate and intrastate commerce. From the generators this current passed along main lines or cables, through a reduction and transforming station, to the trolley wires, and thence to the motors. When he received the electric shock, deceased was engaged in work on one of the main lines necessary to keep it in serviceable condition. If such work was part of interstate commerce, the Workmen's Compensation Act of the State (St. 1917, p. 831) is inapplicable and the judgment below must be reversed. Otherwise, it must be affirmed. Employers' Liability Act \*April 22, 1908, ch. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665); New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New York Central R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536.

\*263

Liability Act \*April 22, 1908, ch. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665); New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New York Central R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536.

[2] Generally, when applicability of the federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employé was engaged in work so closely connected with interstate transportation as practically to be a part of it. *Pedersen v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *Shanks v. Delaware, L. & W. R. R. Co.*, 239 U. S. 556, 558, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *New York Central R. R. Co. v. Porter*, supra; *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133, 39 Sup. Ct. 412, 63 L. Ed. 893.

[3] Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice CLARKE dissents.

(251 U. S. 228)

PRODUCERS' TRANSP. CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al.

(Argued Dec. 12, 1919. Decided Jan. 5, 1920.)

No. 219.

1. CARRIERS ⇨4—CONSTITUTIONAL LAW ⇨ 297—CONVERSION OF PRIVATE PIPE LINE INTO COMMON CARRIER VIOLATION OF DUE PROCESS CLAUSE.

If a petroleum pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, a state could not, by mere legislative fiat or any regulating order of a commission, convert it into a public utility, or make its owner a common carrier, for so to do would be taking private property for a public utility without just compensation, in violation of the due process of law clause of the Fourteenth Amendment of the federal Constitution.

2. CARRIERS ⇨10—PETROLEUM PIPE LINE A COMMON CARRIER OR UTILITY SUBJECT TO STATE REGULATION.

If in the beginning or during its subsequent operation a petroleum pipe line was devoted by its owner to public use, and the right thus extended the public has not been withdrawn, the pipe line is a public utility, and its owner a common carrier, whose rates and practices are subject to public regulation by a state through its Railroad Commission.

3. CARRIERS ⇨4—PETROLEUM PIPE LINE A COMMON CARRIER.

Petroleum pipe line held voluntarily devoted to the use of the public in transporting oil, in view of the articles of incorporation of the company owning the line, the fact that in acquiring right of way it resorted to the power of eminent domain, admissible, under Code Civ. Proc. Cal. §§ 1237, 1238, only if the condemnation was for a public use, and, under Civ.



Code, § 1001, was by an agent of the state, and in view of the contracts, agency agreements, etc., under which the transportation of oil was effected for all producers seeking the service of the line; that is, for the public.

4. CARRIERS  $\S$ 10—CONTRACTS FOR FUTURE TRANSPORTATION NOT NEUTRALIZING POWER OF REGULATION.

A common carrier, as a petroleum pipe line, by making contracts for future transportation, or by mortgaging its property or pledging its income, cannot prevent or postpone subsequent exertion by the state of power to regulate rates and practices.

5. CONSTITUTIONAL LAW  $\S$ 154(2)—CONTRACT CLAUSE DOES NOT PREVENT STATE REGULATION OF CARRIER.

The clause of the federal Constitution, prohibiting impairment of the obligation of contracts by state action, does not interpose any obstacle to exertion by the state of its power to regulate the rates and practices of a common carrier, as a petroleum pipe line, after the carrier has made contracts for future transportation, mortgaged its property, or pledged its income.

In Error to the Supreme Court of the State of California.

Action by the Producers' Transportation Company against the Railroad Commission of the State of California and others. To review judgment for defendants in the Supreme Court of the state of California (176 Cal. 499, 169 Pac. 59), plaintiff brings error. Affirmed.

\*229

\*Messrs. A. V. Andrews, Lewis W. Andrews, and Thomas O. Toland, all of Los Angeles, Cal., for plaintiff in error.

Mr. Douglas Brookman, of San Francisco, Cal., for defendants in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

We here are concerned with a statute of California and an order made thereunder by the state Railroad Commission, both of which are said to be repugnant to the Constitution of the United States, and therefore invalid.

The statute declares that every private corporation or individual operating "any pipe line or any part of any pipe line \* \* \* for the transportation of crude oil, \* \* \* directly or indirectly, to or for the public, for hire, \* \* \* and which said pipe line \* \* \* is constructed or maintained upon, along, over or under any public highway, and in favor of whom the right of eminent domain exists," shall be deemed a common carrier and subject to the provisions of a prior act investing the Railroad Commission with extensive powers over the rates and practices of those who operate public utilities. Stats. 1913, c. 327; Stats. 1911, Ex. Sess. c. 14.

The order of the commission was made aft-

\*230

er notice and \*a full hearing; is based upon a finding that the Producers' Transportation Company, the plaintiff in error, has a pipe line from the San Joaquin oil fields to Port Harford, on the Pacific Coast, whereby it transports crude oil for pay in such circumstances that the statute requires that it be regarded and dealt with as a common carrier; and directs the filing with the commission of the company's schedule of rates or charges and the rules and regulations under which the transportation is conducted.

In the state court the company contended that the evidence before the commission, all of which was before the court, conclusively established that the pipe line was constructed solely to carry crude oil for particular producers from their wells to the seacoast under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use; and the company further contended that the statute, as applied to this pipe line, was repugnant to the due process of law clause of the Fourteenth Amendment and the contract clause of section 10 of article 1 of the Constitution, and that the order of the commission was void as offending against these clauses. The state court sustained both the statute and the order, 176 Cal. 499, 169 Pac. 59, and the company sued out this writ of error.

The company was organized under the laws of California in 1909 and its pipe line was put in operation in 1910. The statute in question took effect August 10, 1913, and the order was made December 31, 1914.

[1, 2] It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public

\*231

use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. Chicago, Burlington & Quincy Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 593, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 595, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Associated Oil Co. v. Railroad Commission, 176 Cal. 518, 523, 526, 169 Pac. 62, L. R. A. 1918C, 849. And see Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77; Louisville & Nashville R. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 495, 25 Sup. Ct. 745, 49 L. Ed. 1135; Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 357, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222; Chicago & Northwestern Ry.

Co. v. Ochs, 249 U. S. 416, 419-420, 39 Sup. Ct. 343, 63 L. Ed. 679. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. *Munn v. Illinois*, supra.

[3] The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil, and it rested this conclusion upon the grounds, first, that one of the things which the company was authorized to do, if it so elected, as shown in its articles of incorporation, was "to establish and carry on \* \* \* a general transportation business for the purpose of transporting \* \* \* any of the oils \* \* \* produced \* \* \* by this corporation or any other person, firm, partnership, association or corporation"; second, that in acquiring its right of way it resorted to an exercise of the power of eminent domain—admissible only if the condemnation was for a "public use," Code Civ. Proc. §§ 1237, 1238; and was by "an agent of the state," Civ. Code, § 1001—and in that proceeding asserted, and obtained a judgment reciting, that it was engaged in transporting oil by pipe line "as a common carrier for hire," and that the right of way was sought for "a public use"; and,

\*232

third, that looking through the maze of contracts, agency agreements and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none, it was apparent that the company did in truth carry oil for all producers seeking its service, in other words, for the public. See *Pipe Line Cases*, 234, U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459.

While some criticism is made of this conclusion and the grounds upon which it is rested, we are of opinion that the grounds have adequate support in the evidence and that they sustain the conclusion. True, one witness stated that "the pipe line was not laid upon the right of way which was obtained in the condemnation suit"; but, as his further testimony disclosed that he meant only that a part of the right of way so obtained was not used when the pipe line was laid, we think the state court rightly regarded the company as having acquired some of its actual right of way by exercising the power of eminent domain as a common carrier. If it was a common carrier at the time of the condemnation suit it is such now, for nothing has occurred in the meantime to change its status.

[4, 5] That some of the contracts before

mentioned were entered into before the statute was adopted or the order made is not material. A common carrier cannot by making contracts for future transportation or by mortgaging its property or pledging its income prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power. *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155, 162, 24 L. Ed. 94; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Union Dry Goods Co. v. Georgia Public Service Commission*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309.

Judgment affirmed.

(251 U. S. 256)

MERGENTHALER LINOTYPE CO. v. DAVIS et al.

(Submitted on Motion to Dismiss Dec. 8, 1919.  
Decided Jan. 5, 1920.)

No. 102.

1. APPEAL AND ERROR ⇌76(1)—ERROR LIES FROM SUPREME COURT TO "FINAL JUDGMENT" OF HIGHEST COURT OF STATE IN WHICH DECISION COULD BE MADE.

Judgment of Missouri Court of Appeals, after the state Supreme Court had on certiorari quashed the prior judgment of the Court of Appeals and remanded the cause to it for decision, *held*, under the Missouri practice, final within Judicial Code, § 237 (Comp. St. § 1214), so as to allow error thereto from the national Supreme Court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. COURTS ⇌396(6)—RAISING FEDERAL QUESTION ON REHEARING IN STATE COURT TOO LATE.

The point that the state statutes conflict with the federal Constitution, having been first advanced in the state appellate court on motion for rehearing, came too late to be ground for sustaining error from the national Supreme Court.

3. APPEAL AND ERROR ⇌5—CLAIM THAT CONTRACT WAS NOT SUBJECT TO STATE STATUTES DOES NOT AUTHORIZE ERROR FROM SUPREME COURT.

Claim that a lease contract was made in the course of interstate commerce, and therefore was not subject to state statutes, was insufficient to challenge validity of the statutes, but at most asserted a title, right, privilege, or immunity under the federal Constitution, not ground for error from the national Supreme Court to the state court, though it might afford basis for certiorari.



In Error to the Springfield Court of Appeals of the State of Missouri.

Action by the Mergenthaler Linotype Company against W. B. Hayes and another. Judgment for plaintiff was reversed (202 S. W. 300), and plaintiff brings error. Dismissed.

Mr. Bradford Butler, of New York City, for plaintiff in error.

Messrs. Ernest A. Green, of St. Louis, Mo., and J. C. Sheppard, of Poplar Bluff, Mo., for defendants in error.

**\*257**

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Dismissal of this writ is asked—first, because it does not run to a final judgment “in the highest court of the State in which a decision in the suit could be had”; second, because there was not properly drawn in question below “the validity of a treaty or statute of, or an authority exercised under the United States” or “the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States.” Judicial Code, § 237, Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); *Coon v. Kennedy*, 248 U. S. 457, 39 Sup. Ct. 146, 63 L. Ed. 358; *Godchaux Co. v. Estopinal*, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. —, decided December 22, 1919.

The trial court, proceeding without jury, gave judgment for rentals due the Linotype Company under written lease of a machine, etc. The Springfield Court of Appeals affirmed that action. 181 S. W. 1183. Thereupon the Supreme Court took jurisdiction by writ of certiorari, rendered an opinion, quashed the judgment of affirmance, and remanded the cause to the Court of Appeals for decision. 271 Mo. 475, 196 S. W. 1132.

Following the Supreme Court's opinion, the Court of Appeals ordered the judgment of the trial court “reversed, annulled and for naught held and esteemed; that the said appellants be restored to all they have lost by reason of the said judgment; that the said appellants recover of the said respondent costs and charges herein expended, and have execution therefor.” A motion there for rehearing having been overruled, without more, this writ of error was sued out.

The assignments of error here challenge the validity of sections 3037–3040 and section 3342, Revised Statutes of Missouri 1909, because in conflict with the Federal Constitution. This claim was first set up in the Court of Appeals upon the motion for rehearing.

**\*258**

\*[1] The Missouri Constitution (article 6, § 8, Amend. of 1884) gives the Supreme Court

“superintending control over the courts of appeals by mandamus, prohibition, and certiorari,” and provides (article 6, § 6, Amend. 1884) that—

“The last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals.”

In *State ex rel. v. Ellison*, 268 Mo. 225, 238, 186 S. W. 1075, 1078, a proceeding upon certiorari, the court declared:

“We can undo what the Court of Appeals has done; \* \* \* and we can send the record back to them to be heard anew by them, \* \* \* but in the Kansas City Court of Appeals alone lies the jurisdiction to hear and to correctly and finally determine the case to which the instant proceeding is ancillary.”

See, also, *State ex rel. v. Ellison*, 269 Mo. 151, 190 S. W. 274; *Schmohl v. Travelers' Ins. Co. (Mo.)* 197 S. W. 60.

In the present cause, the Supreme Court said:

“This is an original proceeding by certiorari. \* \* \* It is urged by relator as his ground for quashal that the opinion of the Court of Appeals is in conflict with the case of *United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567. \* \* \* If this decision be opposed to what we said or the conclusion which we reached upon similar facts (if the facts are similar) in the *Ramlose Case*, we ought to quash the judgment of the Court of Appeals. This is the sole question to be determined.”

Under the Missouri practice and circumstances here disclosed, we think the judgment of the Springfield Court of Appeals was final within the meaning of section 237, Judicial Code. No suggestion is made that further review by the Supreme Court could be had, as matter of discretion or otherwise.

[2] The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. But this point came too late, being first \*advanced below on the motion for rehearing. *Godchaux Co. v. Estopinal*, supra.

**\*259**

[3] The claim that the lease contract was made in course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a “title, right, privilege, or immunity” under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this Court.

Dismissed.



(251 U. S. 239)

SCHALL et al. v. CAMORS et al. In re LE MORE'S ESTATE. In re CARRIERE'S ESTATE.

(Argued November 17, 1919. Decided January 5, 1920.)

No. 84.

1. BANKRUPTCY  320 — UNLIQUIDATED CLAIMS EX DELICTO NOT PROVABLE.

The early bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising ex delicto.

2. BANKRUPTCY  318(1), 320—UNLIQUIDATED CLAIMS EX DELICTO NOT PROVABLE UNLESS TORT-FEASOR OBTAINS SOMETHING OF VALUE.

Unliquidated claims arising ex delicto are not provable in bankruptcy under Bankruptcy Act, § 63 (Comp. St. § 9647), stipulating what debts may be proved, despite section 17, as amended by Act Cong. Feb. 5, 1903, c. 487, § 5 (Comp. St. § 9601), though, if a tort-feasor obtains something of value, there may be a provable claim quasi ex contractu.

3. BANKRUPTCY  353 — UNLIQUIDATED CLAIMS EX DELICTO AS QUASI CONTRACT CLAIMS NOT PROVABLE AGAINST INDIVIDUAL PARTNERS AS WELL AS FIRM.

In view of Bankruptcy Act, § 5 (Comp. St. § 9589), as to partners, merely because proofs of individual claims for fraud against bankrupt partners established the responsibility of each partner for the fraud, so that they were liable in solido not only as partners, but individually, the unliquidated, unprovable claims in tort for the fraud were not provable both against the individual partners and against the firm as claims in quasi contract or equitable debt, the basis of such a liability being unjust enrichment, and the facts showing that no benefit accrued to the individuals as a result of the frauds beyond what accrued to the firm.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In the matter of Albert Le More and Edward E. Carriere, bankrupts, Frederic Camors and others, trustees. Petition to revise and appeal by William Schall, Jr., and others to review an order disallowing their claims was dismissed, and the order affirmed on the appeal (250 Fed. 6, 162 C. C. A. 178), and claimants bring certiorari. Decree affirmed.

Mr. R. S. Rounds, of New York City, for petitioners.

Mr. Monte M. Lemann, of New Orleans, La., for respondents.

\*246

\*Mr. Justice PITNEY delivered the opinion of the Court.

The transactions out of which this controversy arose took place in the years 1913 and 1914. At that time Le More and Carriere carried on business as partners in the cities

of New Orleans, La., and Mobile, Ala. Afterwards, and in the month of May, 1914, upon an involuntary petition in bankruptcy, the firm and the individual members thereof were adjudged bankrupts in the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the present respondents were elected and qualified as trustees of both the partnership and the in-

\*247

dividual estates. The present \*petitioners, constituting the firm of Muller, Schall & Co., filed three proofs of claim, one against the partnership and one against each of the individual partners, all based upon the same transactions, which consisted of the purchase by claimants in the city of New York, through an agent of the bankrupt firm named Trippe, of certain bills of exchange and checks drawn by the firm upon London, Paris, and Antwerp, aggregating about \$70,000, all of which were sold to petitioners for full value on the faith of certain fraudulent representations not necessary to be specified, and, at maturity, were presented for payment, dishonored and protested, and notice thereof given to the firm. At the time of these transactions Le More was in Europe and Carriere in New Orleans, and neither of them participated in the particular transactions, although both were cognizant of them and responsible for the false representations. The particular drafts and checks were not signed or indorsed by either partner, and neither profited from their sale except through his interest in the firm. The transactions occurred in the ordinary course of the firm's business, except that they were fraudulent, and the proceeds of the drafts and checks went to the credit of the firm and were used in the conduct of its business. Petitioners' claim against the partnership is based upon the drafts and checks as partnership obligations in contract, and also upon the damages sustained by reason of the fraudulent representations. The claims against the individual estates of the partners in terms demand only damages for the false representations, but are relied upon as showing also, by inference, an individual liability in quasi contract or equitable debt.

The trustees petitioned the District Court that the latter claims should be expunged. After a hearing the referee in bankruptcy, for reasons expressed in an elaborate opinion, ordered that the claims against the individ-

\*248

\*ual estates should be "expunged and disallowed," and the rights of claimants to participate in dividends in such estates denied. Upon review, the District Court affirmed this order, and, upon appeal, its decree was affirmed by the Circuit Court of Appeals, 250 Fed. 6, 162 C. C. A. 178. A writ of certiorari brings the case here.

No question is made as to whether the referee's order, in wholly expunging the claims

against the individual estates and denying to petitioners all participation therein, went too far in view of the provision of section 5f of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, 548 (Comp. St. § 9589), that—

"Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts."

If the decision be sustained, petitioners nevertheless will be entitled, upon establishing their claim against the partnership, to participate as partnership creditors in any surplus that may remain of individual assets after payment of individual debts. What was asserted and overruled was a right to double proof, establishing a separate and independent liability on the part of the individual partners that would give to the claimants, in addition to their participation in the partnership assets, a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors.

The first and fundamental question is whether a claim for unliquidated damages, arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tortfeasor that may form the basis of an implied contract, is provable in bankruptcy. This question was passed upon by the referee and by the District Court; it has been most elaborately argued pro and con in this court; its general importance in the administration of the Bankruptcy Act warranted a review of

\*249

the case by certiorari; and hence it is \*proper that we dispose of it, without regard to whether a like result might follow, upon the particular facts of the case, from a decision of any subordinate question.

Considering, therefore, the question stated: Among other definitions included in section 1 of the Bankruptcy Act (Comp. St. § 9585) is this:

"(11) 'Debt' shall include any debt, demand, or claim provable in bankruptcy."

Sec. 63 (Comp. St. § 9647) runs as follows:

*"Debts Which may be Proved.—a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; \* \* \* (4) founded upon an open account, or upon a contract express or implied. \* \* \*

"b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

In *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761 (47 L. Ed. 1084), it was said:

"This paragraph b, however, adds nothing to the class of debts which might be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section 63a to be liquidated as the court should direct."

But in *Crawford v. Burke*, 195 U. S. 176, 187, 25 Sup. Ct. 9, 49 L. Ed. 147, the question whether the effect of paragraph b was to cause an unliquidated claim, susceptible of liquidation, but not literally embraced by paragraph a, to be provable in bankruptcy, was regarded as still open.

That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract express or implied, is entirely clear, and has

\*250

been \*recognized repeatedly in our decisions. *F. L. Grant Shoe Co. v. Laird*, 212 U. S. 445, 447, 448, 29 Sup. Ct. 332, 53 L. Ed. 591; *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581, 592, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. Has it the further effect of admitting all unliquidated claims, including those of tortious origin?

[1] Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely ex delicto. Act of April 4, 1800, c. 19, 2 Stat. 19; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13, 8 Fed. Cas. 140, No. 4,199; Act of August 19, 1841, c. 9, 5 Stat. 440; *Doggett v. Emerson*, 1 Woodb. & M. 195, 7 Fed. Cas. 821, 826, No. 3,962; Act of March 2, 1867, c. 176, §§ 11 and 19, 14 Stat. 517, 521, 525; Rev. Stat. U. S., §§ 5014, 5067; *Black v. McClelland*, 3 Fed. Cas. 594, 595, No. 1,462; *In Re Schuchardt*, 8 Ben. 585, 21 Fed. Cas. 739, 742, No. 12,483; *In Re Boston & Fairhaven Iron Works (C. C.)* 23 Fed. 880.

[2] Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its sixty-third section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the Fifty-Fourth Congress. Having then failed of passage, it was submitted again in the Second Session of the



Fifty-Fifth Congress as a substitute for a Senate bill; after disagreeing votes of the two houses, it went to conference and as the re-

\*251

sult of a conference \*report became law. It is significant that section 63, defining "Debts Which may be Proved," remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print; the word "interests" having been substituted for "interest." House Rept. No. 1228, 54th Cong., 1st Sess., p. 39; House Rept. No. 65, 55th Cong., 2d Sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d Sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was called for. Clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely ex delicto. Such claims might easily have been mentioned if intended to be included. Upon every consideration we are clear that claims based upon a mere tort are not provable. Where the tortious act constitutes at the same time a breach of contract, a different question may be raised, with which we have no present concern; and where, by means of the tort, the tort-feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim quasi ex contractu. Crawford v. Burke, 195 U. S. 176, 187, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 186, 27 Sup. Ct. 493, 51 L. Ed. 762; Clarke v. Rogers, 183 Fed. 518, 521, 522, 106 C. C. A. 64, affirmed 228 U. S. 534, 543, 33 Sup. Ct. 587, 57 L. Ed. 953.

Of course, sections 63 and 17 are to be read together. The reference in the latter section to "provable debts," defined in the former would be sufficient to show this. See Crawford v. Burke, 195 U. S. 176, 193, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 186, 27 Sup. Ct. 493, 51 L. Ed. 762; Friend v. Talcott, 228 U. S. 27, 39, 33 Sup. Ct. 505, 57 L. Ed. 718; Clarke v. Rogers, 228 U. S. 534, 548, 33 Sup. Ct. 587, 57 L. Ed. 953. It is petitioners' contention that section 17, as amended in 1903 (Act of February 5, 1903, c. 487, § 5, 32 Stat. 797, 798 [Comp. St. §

\*252

9601]), amounts to a legislative \*construction admitting tort claims to proof. The section as it stood before and the nature of the amendment, are set forth in the margin.<sup>1</sup> We are

<sup>1</sup> Section as originally enacted (30 Stat. 550):

"Sec. 17. *Debts Not Affected by a Discharge.*—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or

referred to the committee's report (House Rept. No. 1698, 57th Cong., 1st Sess., pp. 3, 6) as indicating that by the law as it stood, in the opinion of the committee, claims created by fraud, but not reduced to judgment, were discharged; reference having been made to *In re Rhutassel* (D. C.) 96 Fed. 597, and *In re Lewensohn* (D. C.) 99 Fed. 73, affirmed 104 Fed. 1006, 44 C. C. A. 309, as contradictory decisions upon the point. But neither the report of the committee nor the language of the amendment gives the least suggestion of an intent to enlarge the description of provable claims as set forth in section 63. On the contrary, the purpose was to limit

\*253

more \*narrowly the effect of a discharge by enlarging the class of provable debts that were to be excepted from it. By the terms of the section, both before and after amendment, the scope of the exception was qualified by the fact that the discharge released the bankrupt only from "provable debts." And if the excepting clause as amended might seem to extend to some claims not otherwise provable, its own force must be deemed to be limited by referring to section 63 for the definition of provability. It is not admissible to give to this amendment, confessedly designed to restrict the scope of a discharge in bankruptcy, the effect of enlarging the class of provable claims.

Aside from section 17 or the amendment thereof, it has been held by the federal courts generally that section 63 does not authorize the liquidation and proof of claims arising ex delicto and unaffected by contract express or implied. *In re Hirschman* (D. C.) 104 Fed. 69, 70, 71; *In re Yates* (D. C.) 114 Fed. 365, 367; *In re Crescent Lumber Co.* (D. C.) 154 Fed. 724, 727; *In re Southern Steel Co.* (D. C.) 183 Fed. 498.

And that the amendment of section 17 does not enlarge the class of provable claims enumerated in section 63 has been recognized in several well-considered decisions of the feder-

*obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."*

Amendment of 1903 (32 Stat. 798) inserted in the place of clause 2 the following:

"(2) *Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.*"

NOTE.—By a further amendment (Act of March 2, 1917, ch. 153, 39 Stat. 999) there was inserted after the word "female," instead of "or for criminal conversation," the following: "or for breach of promise of marriage accompanied by seduction, or for criminal conversation."



al courts which have held, upon satisfactory grounds, that pure tort claims are not provable. In *re United Button Co.* (D. C.) 140 Fed. 495, 499, et seq., on appeal *Brown v. United Button Co.*, 149 Fed. 48, 52, 53, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445; In *re New York Tunnel Co.*, 159 Fed. 688, 690, 86 C. C. A. 556. In *Jackson v. Wauchula Mfg. Co.*, 230 Fed. 409, 411, 144 C. C. A. 551, and again in the present case (250 Fed. 7, 162 C. C. A. 178), the Circuit Court of Appeals for the Fifth Circuit passed the question as unnecessary for the decision.

There is an argument *ab inconvenienti*, based upon the supposed danger that if tort claims be held not provable they may be pre-

\*254

ferred by failing debtors without redress \*under section 60, a and b (30 Stat. 562), amended February 5, 1903 (chapter 487, § 13, 32 Stat. 797, 799), amended June 25, 1910 (chapter 412, § 11, 36 Stat. 838, 842 [Comp. St. § 9644]), held to apply only to provable claims. *Richardson v. Shaw*, 209 U. S. 365, 381, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. See, also, *Clarke v. Rogers*, 228 U. S. 534, 542, 33 Sup. Ct. 587, 57 L. Ed. 953. We are not much impressed. If there be danger of mischief here, other than such as may be reached under the provisions of section 67e or section 70e (Comp. St. §§ 9651, 9654) respecting fraudulent conveyances and transfers (see *Dean v. Davis*, 242 U. S. 438, 444, 37 Sup. Ct. 130, 61 L. Ed. 419), the Congress may be trusted to supply the remedy by an appropriate amendment.

[3] It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable in *solido* not only as partners, but individually, and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubt-

less it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where by reason of insolvency it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. 547, 548) estab-

\*255

lishes on a firm basis the respective \*equities of the individual and firm creditors.<sup>2</sup> Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since in this case the tort was done in the course of the partnership business, for the benefit of the firm and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors. *Reynolds v. New York Trust Co.*, 188 Fed. 611, 619, 620, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391.

Decree affirmed.

<sup>2</sup> "Sec. 5. Partners.— \* \* \*

"d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. \* \* \*

"f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. \* \* \*

"g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. \* \* \*

(251 U. S. 210)

## UNITED STATES v. STANDARD BREWERY, Inc.

## SAME v. AMERICAN BREWING CO.

(Argued Dec. 11, 1919. Decided Jan. 5, 1920.)

Nos. 458, 474.

1. STATUTES  $\S$ 188—MEANING TO BE SOUGHT IN LANGUAGE USED.

In the construction of a law, its meaning must first be sought in the language employed, and, if that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it.

2. STATUTES  $\S$ 194—GENERAL EXPRESSION APPLIES TO ALL, AND NOT LAST ONLY, OF PRECEDING WORDS.

As a matter of ordinary construction, where several words are followed by a general expression, which is as much applicable to the first and other words as to the last, the expression is not limited to the last, but applies to all.

3. STATUTES  $\S$ 219—RULINGS OF INTERNAL REVENUE DEPARTMENT CANNOT ADD TO TERMS OF ACT.

Administrative rulings, as by the Internal Revenue Department in relation to intoxicating liquors, cannot add to the terms of an act of Congress, and make conduct criminal which such laws leave untouched.

4. CONSTITUTIONAL LAW  $\S$ 48—STATUTE CONSTRUED IN FAVOR OF CONSTITUTIONALITY.

In considering an act of Congress, a construction which might render it unconstitutional is to be avoided.

5. INTOXICATING LIQUORS  $\S$ 216, 238(3)—INDICTMENT CHARGING MANUFACTURE OF ONE-HALF PER CENT. BEER AS VIOLATION OF WAR-TIME PROHIBITION ACT INSUFFICIENT.

Under War-Time Prohibition Act Nov. 21, 1918, indictments charging that defendant brewers unlawfully used certain grains, cereals, fruit, and other food products in the manufacture and production of beer for beverage purposes, which contained as much as one-half of 1 per cent. of alcohol, both by weight and volume, but failing to allege that liquor was intoxicating, did not charge an offense, and the court cannot say as a matter of law that such liquor is intoxicating.

6. INDICTMENT AND INFORMATION  $\S$ 60—CHARGE OF EACH ELEMENT OF OFFENSE NECESSARY.

An indictment must charge each and every element of an offense.

In Error to the District Court of the United States for the District of Maryland.

In Error to the District Court of the United States for the Eastern District of Louisiana.

The Standard Brewery, Incorporated, and the American Brewing Company, were indicted for violation of the War-Time Prohibition Act. Demurrer to the indictment was sus-

tained ([D. C.] 260 Fed. 486), and the United States brings error. Affirmed.

Mr. Assistant Attorney General Frierson and Mr. Solicitor General King, of Atlanta, Ga., for the United States.

Mr. William L. Marbury, of Baltimore, Md., for defendant in error Standard Brewing Co.

Mr. Elihu Root, of New York City, for defendant in error American Brewing Co.

\*214

\*Mr. Justice DAY delivered the opinion of the Court.

These causes are here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704), and require the construction of the so-called "War-Time Pro-

\*215

hibition \*Act" of November 21, 1918, c. 212, 40 Stat. 1045, 1046, 1047.

In No. 458 the Standard Brewing Company was indicted for unlawfully using certain grains, cereals, fruit, and other food products on the 4th of June 1919, in the manufacture and production of beer for beverage purposes which, it is charged, contained as much as one-half of 1 per cent. of alcohol by both weight and volume. In No. 474 the American Brewing Company was indicted for the like use on the 26th day of June, 1919, of certain grains, cereals and food products in the manufacture and production of beer containing a like percentage of alcohol.

In the indictment in No. 474 it was charged that at the time of the alleged offense the termination of demobilization had not been determined and proclaimed by the President.

In each case a demurrer was sustained by the District Court.

Before considering the construction of of that portion of the act involved in these cases it will be helpful to give a short history of the preceding legislation that led up to it. The Food Control Act of August 10, 1917, 40 Stat. c. 53, pp. 276, 282, authorized the President to prescribe and give public notice of limitations, regulations, or prohibitions respecting the use of foods, fruits, food materials or feed, in the production of malt or vinous liquors for beverage purposes, including regulations for the reduction of the alcoholic content of any such malt or vinous liquor, in order to assure an adequate and continuous supply of food, and promote the national security and defense. Whenever notice should be given and remain unrevoked no person, after a reasonable time prescribed in such notice, could use any food, fruits, food materials or feeds in the production of malt or vinous liquors, or import any such liquors except under license and in compliance with lawfully prescribed

\*216

rules and regulations. Under the \*authority

thus conferred, the President issued various proclamations. On December 8, 1917, he issued one (40 Stat. 1728, Comp. St. 1918, § 3115½*l*, note), forbidding the production of all malt liquor, except ale and porter, containing more than 2.75 per cent. of alcohol by weight. On September 16, 1918, he issued a second proclamation (40 Stat. 1848), prohibiting after December 1, 1918, the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contained alcohol. On January 30, 1919, he issued a third proclamation (40 Stat. 1930), which modified the others to the extent of permitting the use of grain in the manufacture of nonintoxicating beverages, it being recited therein that the prohibition of the use of grain in the manufacture of such beverages had been found no longer essential in order to assure an adequate and continuous supply of food. And on March 4, 1919, he issued a fourth proclamation (40 Stat. 1937) amending his proclamation of September 16, 1918, so as to prohibit the production only of intoxicating malt liquors for beverage purposes.

It thus appears that the President, acting under the act of August 10, 1917, has reduced the prohibition of the use of food materials so that now it is limited to the manufacture of such liquors as are in fact intoxicating.

In the light of all this action we come to consider the proper construction of so much of the act of November 21, 1918, as is here involved, which provides:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the army and

\*217

navy, it shall be unlawful to sell for \*beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

[1] Nothing is better settled than that in the construction of a law its meaning must

first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 15 Sup. Ct. 508, 39 L. Ed. 601; *United States v. Bank*, 234 U. S. 245, 258, 34 Sup. Ct. 846, 56 L. Ed. 1298; *Caminetti v. United States*, 242 U. S. 470, 485, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168. Looking to the act we find these are its declared purposes: (1) To conserve the man power of the nation; (2) to increase efficiency in the production of arms, munitions ships, and food and clothing for the army and navy. To these ends it is made illegal to sell distilled spirits for beverage purposes or to remove the same from bond for such purposes except for export. And after May 1, 1919, until the conclusion of the war, and until demobilization is proclaimed by the President, no grains, cereals, fruit, or other food products are permitted to be used in the

\*218

manufacture or production of \*beer, wine or other intoxicating malt or vinous liquors for beverage purposes.

The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning, *Market Co. v. Hoffman*, 101 U. S. 112, 115, 25 L. Ed. 782; and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words.

[2] This court had occasion to deal with a question very similar in character in the case of the *United States v. United Verde Copper Co.*, 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449, where an act permitted the use of timber on the public lands for building, agricultural, mining and other domestic purposes, and held that we could not disregard the use of the word "other" notwithstanding the contention that it should be eliminated from the statute in order to ascertain the true meaning. So here, we think it clear that the framers of the statute intentionally used the phrase "other intoxicating" as relating to and defining the immediately preceding designation of beer and wine.



"As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." Lord Bramwell in *Great Western Railway Co. v. Railway Company*, L. R. 9 App. Cas. 787, 808.

**\*219**

\*The declared purpose of Congress was to conserve the nation's man power and increase efficiency in producing war essentials; and it accordingly undertook to prohibit the manufacture of intoxicating liquors whose use might interfere with the consummation of that purpose. Other provisions of the act lend support to this view. The sale and withdrawal from bond of distilled spirits (always intoxicating) were declared unlawful after June 30, 1919—their manufacture had already been prohibited. The sale of beer, wine and other intoxicating malt or vinous liquors was prohibited after the same date and the importation of all such liquors and also of distilled liquors was made immediately unlawful. The President was empowered at once to establish zones about coal mines, manufactories, shipbuilding plants, etc., and "to prohibit the sale, manufacture or distribution of intoxicating liquors in such zones."

The fact that the Treasury Department may have declared taxable under many revenue acts all beer containing one-half of 1 per centum of alcohol is not important. Such rulings did not turn upon the intoxicating character of the liquid, but upon classification for taxation controlled by other considerations. A liquid may be designated as beer and subjected to taxation although clearly nonintoxicating.

"The question whether a fermented malt liquor is intoxicating or nonintoxicating is immaterial under the internal revenue laws, although it may be a very material question under the prohibitory laws of a state or under local ordinances." T. D. 804.

[3] As to the insistence that the Internal Revenue Department has determined that a beverage containing one-half of 1 per cent. of alcohol should be regarded as intoxicating within the intentment of the act before us little need be said. Nothing in the act remits the determination of that question to the decision of the revenue officers of the

**\*220**

government. While entitled to respect, \*as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress. Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. *Waite v. Macy*, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892; *United States v. George*, 228 U. S. 14, 25, 33 Sup. Ct. 412, 57 L. Ed. 712; *United States v. United Verde*

*Copper Co.*, 196 U. S. 207, 215, 25 Sup. Ct. 222, 49 L. Ed. 449.

[4-6] Furthermore, we must remember, in considering an act of Congress, that a construction which might render it unconstitutional is to be avoided. We said in *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854):

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See, also *United States v. D. & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

We held in *Hamilton, Collector v. Kentucky Distillery & Warehouse Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. —, decided December 15, 1919, that the war power of Congress, as applied to the situation outlined in the opinion in that case, enabled it to prohibit the sale of intoxicating liquor for beverage purposes. But the question was neither made nor decided as to whether Congress could prohibit even in time of war the manufacture and sale of non intoxicating beverages.

An indictment must charge each and every element of an offense, *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830. We cannot say, as a matter of law, that a beverage containing not more than one-half of 1 per cent. of alcohol is intoxicating, and as neither indictment so charges it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are

Affirmed.

(251 U. S. 264)

JACOB RUPPERT v. CAFFEY, U. S.  
Atty., et al.

(Argued Nov. 20 and 21, 1919. Decided Jan. 5, 1920.)

No. 603.

1. INTOXICATING LIQUORS  $\Leftrightarrow$  134—WAR-TIME PROHIBITION ACT PROHIBITS MALT LIQUOR CONTAINING HALF OF ONE PER CENT. OF ALCOHOL.

By War-Time Prohibition Act Nov. 21, 1918, as amended by Volstead Act Oct. 28, 1919, prohibition of the manufacture of intoxicants pursuant to the war-time powers of Congress was validly extended to all beer and other malt liquor containing as much as one-half of 1 per cent. of alcohol by volume, and a brewer may not show, as basis for relief against enforcement of such legislation, that the beer manufactured by it with alcoholic content not greater than 2.75 per cent. in weight and 3.4 per cent. in volume is not in fact intoxicating.

2. INTOXICATING LIQUORS ⚡6—UNDER POLICE POWER OF STATE KINDRED NONINTOXICATING LIQUORS MAY BE PROHIBITED.

The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred non-intoxicating liquors, so far as necessary to make the prohibition of intoxicants effective, but is a single broad power to make such laws by way of prohibition as may be required effectively to suppress the traffic in intoxicating liquors.

3. INTOXICATING LIQUORS ⚡2½, New, vol. 8A Key-No. Series—VALIDITY OF VOLSTEAD ACT AMENDING WAR-TIME PROHIBITION ACT.

Volstead Act Oct. 28, 1919, tit. 1, § 1, amending War-Time Prohibition Act Nov. 21, 1918, to prohibit the manufacture of beer or other malt liquors containing in excess of one-half of 1 per cent. of alcohol, though taking effect on its passage, as required by the war emergency, in the opinion of Congress, *held* not invalid as enforced against a brewer which claimed it had manufactured 2.75 per cent. beer under the general permission of the President in his proclamation of December 8, 1917.

4. CRIMINAL LAW ⚡304(20)—ALE AND PORTER NOTORIOUSLY ARE "INTOXICATING LIQUORS."

"Ale" and "porter" are intoxicating liquors to the knowledge of all.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intoxicating Liquor.]

Mr. Justice McReynolds, Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Clarke, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Jacob Ruppert, a corporation, against Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York. From a decree of dismissal, plaintiff appeals. Affirmed.

Messrs. Elihu Root and William D. Guthrie, both of New York City, for appellant.

Messrs. Assistant Attorney General Friereson and Solicitor General A. L. King, of Atlanta, Ga., for appellees.

\*278

\*Mr. Justice BRANDEIS delivered the opinion of the Court.

By the Act of August 10, 1917, c. 53, § 15, 40 Stat. 276, 282 (Comp. St. 1918, § 3115½), a war measure known as the Lever Act, Congress prohibited the use after September 9, 1917, of food materials or feeds

in the production of distilled spirits for beverage purposes and authorized the President to limit or prohibit their use in the production of malt or vinous liquors for beverage purposes, so far as he might, from time to time, deem it essential to assure an adequate supply of food, or deem it helpful in promoting the national security or defense. Under the power so conferred the President, by proclamation of December 8, 1917, prohibited the production after January 1, 1918, of any "malt liquor except ale and porter" containing more than 2.75 per centum of alcohol by weight. By proclamation of September 16, 1918, the prohibition was extended to "malt liquors, including near beer, for

\*279

\*beverage purposes, whether or not such malt liquors contain alcohol"; and by proclamation of March 4, 1919, the prohibition was limited "to intoxicating malt liquors." Under section 2 of the act (section 3115½gee) the duty of enforcing the above provisions was assigned to the Commissioner of Internal Revenue. This act contained no provision prohibiting the sale of intoxicating or other liquors.

On November 21, 1918, the so-called War-Time Prohibition Act (40 Stat. 1045, c. 212) was approved. It provided that:

"After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. \* \* \*" Section 1.

On February 6, 1919, the Commissioner of Internal Revenue ruled (Treasury Decision 2788) that a beverage containing as much as one-half of 1 per centum of alcohol by volume would be regarded as intoxicating within the intent of the Act of November 21, 1918, and that after May 1, 1919, persons would not be permitted to qualify as brewers if the alcoholic content of their product equaled or exceeded that percentage. In so ruling the Commissioner adopted and applied to this prohibitory act the same classification of malt liquors which had been applied in administering the laws concerning the taxation of beer and other similar fermented liquors.

\*280

\*For since 1902 (Treasury Decision 514) fermented liquor containing as much as one-half of 1 per centum of alcohol had been treated



as taxable under Revised Statutes, §§ 3339 and 3242 (Comp. St. §§ 6143, 5965), and this classification was expressly adopted in the War Revenue Act of October 3, 1917, c. 63, § 307, 40 Stat. 311 (Comp. St. 1918, § 6144b). The correctness of this construction of the act was promptly and earnestly controverted by the brewers, who insisted that Congress had intended to prohibit the production only of such beer or other malt liquors as were in fact intoxicating. The attempt was then made to remove the doubt by new legislation before May 1, 1919, when the act would by its terms become operative. On February 26 the House Committee on the Judiciary reported favorably an amendment to H. R. 13581 providing:

"The words 'beer, wine or other intoxicating malt or vinous liquors' in the war prohibition act shall be construed to mean any liquors which contain in excess of one-half of one per centum of alcohol."

The Sixty-Fifth Congress ended on March 4 without acting on this bill, and the Sixty-Sixth Congress did not convene in extra session until May 19. On June 30, the House Committee on the Judiciary reported substantially the same provision as section 1 of title 1 of H. R. 6810; but it was not enacted until October 28, 1919, when as the Volstead Act (Act Oct. 28, 1919, c. 85) it was passed over the President's veto. (a)

\*281

\*Immediately after the passage of the Volstead Act, this suit was brought in the District Court of the United States for the Southern District of New York by Jacob Rupert against Caffey, United States Attorney, and McElligott, Acting Collector of Internal Revenue, to enjoin the enforcement as against the plaintiff of the penalties provided in the War-Time Prohibition Act as amended by the Volstead Act. It was heard below on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss, and, having been dismissed, was brought here by direct appeal under section 238 of the

Judicial Code (Comp. St. § 1215). The bill alleged that plaintiff, the owner of a brewery and appurtenances, was on October 28, 1919, engaged in the manufacture of a beer containing more than one-half of 1 per centum of alcohol by volume, and less than 2.75 per centum by weight or 3.4 per centum by volume, and had then on hand a large quantity of such beer, and that this beer was not in fact intoxicating. Plaintiff contended (1) that the act of November 21, 1918, had become void or had expired by its own terms before the bill was filed; (2) that its prohibition by its terms was limited to beer which was in fact intoxicating; (3) that the Act of October 28, 1919, title 1, § 1, which purported to extend the prohibition to the manufacture and sale of beer not in fact intoxicating, exceeded the war power of Congress; and that thereby violation of rights guaranteed to plaintiff by the Fifth Amendment was threatened.

This case was heard and decided below with *Dryfoos et al. v. Edwards* and it was argued here on the same day with that case and *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. —, decided December 15,

\*282

1919. For the reasons set forth in \*the opinion in those cases, the Act of November 21, 1918, was and remained valid as against the plaintiff and had not expired. For the same reasons section 1 of title 1 of the Act of October 28, 1919, was not invalid, merely because it was new legislation. But it is insisted that this legislation is nevertheless void as against the plaintiff, because Congress could not, even under its full war powers, prohibit the manufacture and sale of non-intoxicants, and, at all events, could not without making compensation, extend the prohibition to nonintoxicating liquor acquired before the passage of the act. These objections require consideration.

[1, 2] First. May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weight and 3.4 per centum in volume is not in fact intoxicating? The government insists that the fact alleged is immaterial since the passage of the Volstead Act by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as one-half of 1 per centum of alcohol by volume.

If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the nation's efficiency in men, munitions and supplies is as full and complete as the police power of the states to effectively enforce such prohibition in order to promote the health, safety and morals of the community, it is clear that this provision of the Volstead Act is valid and has rendered immaterial the question whether plaintiff's beer is intoxicat-

Note (a): "The term 'War Prohibition Act' used in this act shall mean the provisions of any act or acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of title II of this act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe."



ing. For the legislation and decisions of the highest courts of nearly all of the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly ap-

\*283

pears \*that a liquor law, to be capable of effective enforcement must, in the opinion of the Legislatures and courts of the several states, be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt, or brewed liquors, to all liquors within that general description regardless of alcoholic content; (b)

\*284

or to such of these liquors as contain \*a named percentage of alcohol; and often several such standards are combined, so that certain specific and generic liquors are altogether

Note (b): Cases to this effect are *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. Rep. 20; *Brown v. State*, 17 Ariz. 314, 152 Pac. 578; *Bradshaw v. State*, 76 Ark. 562, 89 S. W. 1051; *Seibert v. State*, 121 Ark. 258, 180 S. W. 990; *In re Lockman*, 18 Idaho, 465, 110 Pac. 253, 46 L. R. A. (N. S.) 759; *Hansberg v. State*, 120 Ill. 21, 23, 8 N. E. 857, 60 Am. Rep. 549 (dictum); *Kurz v. State*, 79 Ind. 488; *Sawyer v. Bottl*, 147 Iowa, 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1007; *State v. Colvin*, 127 Iowa, 632, 103 N. W. 968; *State v. Miller*, 92 Kan. 994, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916B, 365; *State v. Trione*, 97 Kan. 365, 155 Pac. 29; *Com. v. McGrath*, 185 Mass. 1, 69 N. E. 340; *Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 South. 316; *State v. Centennial Brewing Co.*, 55 Mont. 500, 179 Pac. 296; *Luther v. State*, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146; *State v. Thornton*, 63 N. H. 114; *People v. Cox*, 106 App. Div. 239, 94 N. Y. Supp. 526; *People v. O'Reilly*, 129 App. Div. 522, 114 N. Y. Supp. 258; *La Follette v. Murray*, 81 Ohio St. 474, 91 N. E. 294; *State v. Walder*, 83 Ohio St. 63, 93 N. E. 531; *State v. Bottling Works*, 19 N. D. 397, 124 N. W. 387, 26 L. R. A. (N. S.) 872; *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92; *State v. Oliver*, 26 W. Va. 422, 427, 53 Am. Rep. 79 (dictum); *Pennell v. State*, 141 Wis. 35, 123 N. W. 115; *United States v. Cohn*, 2 Ind. T. 474, 52 S. W. 38; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.

Contra: *City of Bowling Green v. McMullen*, 134 Ky. 742, 122 S. W. 823, 26 L. R. A. (N. S.) 895; *Reisenberg v. State* (Tex. Cr. App.) 84 S. W. 585; *State v. Olson*, 95 Minn. 104, 103 N. W. 727; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Virgo*, 14 N. D. 293, 103 N. W. 610; *State v. Maroun*, 128 La. 829, 55 South. 472; *Howard v. Acme Brewing Co.*, 143 Ga. 1, 83 S. E. 1096, Ann. Cas. 1917A, 91.

In Kansas, the Legislature overruled this decision by Laws 1909, c. 164, § 4 (see *State v. Trione*, supra); in Minnesota, made the prohibition apply to all malt liquors containing as much as  $\frac{1}{2}$  of 1 per cent. of alcohol by volume, Laws 1919, c. 455, p. 537; in North Dakota by Laws 1909, c. 187, p. 277 (see *State v. Bottling Works*, 19 N. D. 397, 124 N. W. 387, 26 L. R. A. [N. S.] 872), the prohibition applied to all liquors which retained "the alcoholic principle"; in Louisiana, Acts 1914, Nos. 146, 211, operated to cut down the per cent. of alcohol to 1.59 (see *State v. George*, 136 La. 906, 67 South. 956); in Georgia, Acts 1919, p. 123, changed the rule

forbidden and such other liquors as contain a given percentage of alcohol.

A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains one-half of 1 per cent. of alcohol by volume. A survey of the liquor laws of the states reveals that in sixteen states the test is either a list of enumerated beverages without regard to whether they contain any alcohol or the presence of any alcohol in a beverage, regardless of quantity; (c) in eighteen

of *Howard v. Acme Brewing Co.*, supra, see note (d) 4.

Note (c): 1. Alabama: Gen. Laws Sp. Sess. 1907, No. 53, § 1, p. 71, made it unlawful to sell "any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages, or other liquors or beverages, \* \* \* which if drunk to excess will produce intoxication."

*Marks v. State*, 159 Ala. 71, 78, 48 South. 864, 867, (133 Am. St. Rep. 20) stated that "or other liquors or beverages \* \* \* which if drunk to excess will produce intoxication" did not modify or limit the prohibition of the liquors enumerated. Any unenumerated liquor, however, must be proved to be intoxicating if drunk to excess.

Gen. Laws 1919, Act 7, p. 6, in terms prohibits all liquors containing any alcohol.

2. Arizona: Constitution, art. 23, § 1, prohibits "ardent spirits, ale, beer, wine, or intoxicating liquor, or liquors of whatever kind."

*Brown v. State*, 17 Ariz. 314, 152 Pac. 578, held that "beer" was prohibited, whether or not it was intoxicating.

3. Arkansas: Acts 1917, Act 13, p. 41, as amended by Acts 1919, Act 87, p. 75, prohibits "any alcoholic, vinous, malt, spirituous, or fermented liquors."

*Seibert v. State*, 121 Ark. 258, 180 S. W. 990, held that the enumerated liquors are prohibited, whether they are intoxicating or not if they contained any alcohol.

An earlier act contained the words "or other intoxicating liquors," following "or fermented liquors." It was held in *Bradshaw v. State*, 76 Ark. 562, 89 S. W. 1051, that this clause did not modify the enumerated liquors, and that they were prohibited, whether intoxicating or not.

4. Colorado: Sess. Laws 1915, c. 98, § 30 (prohibition), as amended by Sess. Laws 1919, c. 141, prohibits "intoxicating liquors \* \* \* no matter how small the percentage of alcohol they may contain."

4½. Hawaii: Rev. Laws 1915, § 2101 (license law). "Intoxicating liquors" \* \* \* shall be held to include spirituous liquors, and any beverage in which may be found any percentage of distilled spirits, spirits, alcohol and alcoholic spirits as defined by the laws of the United States, and any sake, beer, lager beer, ale, porter and malt or fermented or distilled liquors."

5. Idaho: Sess. Laws 1909, p. 18 (local option). "Spirituous, vinous, malt and fermented liquors, \* \* \* and other drinks that may be used as a beverage and produce intoxication."

In *re Lockman*, 18 Idaho, 465, 110 Pac. 253, 46 L. R. A. (N. S.) 759, held that the enumerated liquors are within the act whether or not they are intoxicating.

Constitutional amendment of November 7, 1916 (prohibition). Sess. Laws 1917, p. 528. The enforcement laws are cumulative, including Sess. Laws 1915, c. 28; Sess. Laws 1915, c. 11 (see section 23); Sess. Laws 1911, c. 15; and Sess. Laws 1909, p. 18. Thus the definition and interpretation above are retained.

6. Iowa: Code Supp. 1915, § 2382, prohibits "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever."

*State v. Intoxicating Liquors*, 76 Iowa, 243, 41 N.

\*285

states it \*is the presence of as much as or more

W. 6, 2 L. R. A. 408 (1888), State v. Colvin, 127 Iowa, 632, 103 N. W. 968 (1905), and Sawyer v. Botti, 147 Iowa, 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1907 (1910), held that liquor containing any alcohol whatever is prohibited.

7. Kansas: Laws 1881, c. 123, § 1 (Gen. Stat. 1915, § 5498), prohibits "any spirituous, malt, vinous, fermented or other intoxicating liquors."

Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284, held that in every case the question of the intoxicating quality of the beverage must go to the jury.

Laws 1909, c. 164, § 4 (Gen. Stat. 1915, § 5501), amended the act of 1881 as follows: "All liquors mentioned in section 1 of this act shall be construed and held to be intoxicating liquors within the meaning of this act."

State v. Miller, 92 Kan. 994, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916B, 365, and State v. Tri- one, 97 Kan. 365, 155 Pac. 29, declared that the former case is no longer the law, and that the mere presence of the liquors mentioned makes the substance intoxicating for purposes of the prohibition statutes.

See, also, Laws 1917, cc. 215, 216, "Bone-Dry Prohibition Law."

8. Maryland: Laws 1914, c. 831, § 1, p. 1569 (prohibition in certain counties), forbids "any spirituous, vinous, fermented, malt, or intoxicating liquors, or any mixture thereof containing alcohol for beverage purposes. \* \* \*"

Laws 1916, c. 389, § 1, p. 786, prohibits in a certain county "any kindred preparation or beverage, having the appearance and taste of lager beer \* \* \* except those beverages that are labeled \* \* \* stating that the beverage is free of alcohol."

See, also, note (d) 9, and note (h). These citations are not exhaustive of the Maryland county prohibition statutes.

9. Michigan: Public Acts 1919, No. 53, § 3, p. 81. "Intoxicating liquors" \* \* \* include any vinous, malt, brewed, fermented or spirituous liquors, \* \* \* and all liquids \* \* \* which contain any alcohol and are capable of being used as a beverage."

10. Mississippi: Code 1906, § 1746, as amended by Laws 1908, c. 115, p. 116 (Code 1917, § 2086), prohibits the sale of "any vinous, alcoholic, malt, intoxicating or spirituous liquors, or intoxicating bitters, or other drinks, which if drank to excess will produce intoxication."

Fuller v. City of Jackson, 97 Miss. 237, 52 South. 373, 30 L. R. A. (N. S.) 1078; Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 South. 316. All the enumerated drinks are prohibited whether they contain alcohol or are intoxicating or both or neither.

Laws 1918, c. 189, § 1, p. 210, prohibits "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

11. New Mexico: Stats. 1915, § 2874. "All persons who make for sale fermented liquors of any name or description, from malt, wholly or in part, or from any substitute therefor, shall be considered brewers." Section 2937. "The words 'intoxicating liquors' \* \* \* include all malt, vinous and spirituous liquors."

Constitutional amendment, proposed by Legislature of 1917, Laws 1917, p. 352, prohibits "ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol."

12. New York: Laws 1897, c. 312, § 2, Laws 1903, c. 486, § 2, as amended by Laws 1905, c. 679, § 2, defining intoxicating liquors as "all distilled or rectified spirits, wine, fermented and malt liquors."

People v. Cox, 106 App. Div. 299, 94 N. Y. Supp. 526, held that "malt rose," containing ".74 per cent. of alcohol" and made from malt, was within the meaning of the act.

People v. O'Reilly, 129 App. Div. 522, 114 N. Y. Supp. 258, affirmed 194 N. Y. 592, 88 N. E. 1128, holds that beer comes within the act whether intoxicating or not, and declares that an earlier line of cases holding that the intoxicating quality is al-

than one-half of 1 per cent. of alcohol; (d)

ways for the jury to decide are no longer applicable where liquors are named in the act.

Laws 1917, c. 624, § 2, p. 1835 (city local option law), continues the definition.

13. Ohio: Rev. Stat. 1906, § 4364-9, laid a tax on the business of "trafficking in spirituous, vinous, malt, or any intoxicating liquors."

La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294, held that "Friedon beer," a malt liquor containing .47 per cent. of alcohol and not intoxicating was within the statute. State v. Walder, 83 Ohio St. 68, 93 N. E. 531.

Laws 1919, § 6212-15, p. 388 (prohibition). " \* \* \* 'Liquor' and 'intoxicating liquors' include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor and also any alcoholic liquid \* \* \* which \* \* \* capable of being used as a beverage."

14. South Dakota: Sess. Laws 1890, c. 101, § 6, p. 229 (prohibition). Intoxicating liquors include "all spirituous, malt, vinous, fermented or other intoxicating liquors, or mixtures \* \* \* that will produce intoxication."

Rev. Pol. Code 1903, § 2834, requires a license to sell "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors."

State v. Ely, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92, held that the liquors named come within the act whether or not they are intoxicating.

Rev. Code 1919, § 10237. "Intoxicating liquors" \* \* \* include whisky, alcohol, brandy, gin, rum, wine, ale, beer, absinthe, cordials, hard or fermented cider, \* \* \* and all distilled, spirituous, vinous, malt, brewed and fermented liquors, and every other liquid, \* \* \* containing alcohol, \* \* \* which \* \* \* is capable of being used as a beverage."

14½. United States: 28 Stat. 697, § 8 (Indian Territory prohibition), prohibits "any vinous, malt, or fermented liquors, or any other intoxicating drinks."

United States v. Cohn, 2 Ind. Ter. 474, 52 S. W. 38, held that the act prohibits all malt liquors whether or not they are intoxicating.

See, also, 39 Stat. 903 (Alaska prohibition), and 39 Stat. 1123 (D. of C. prohibition), both of which prohibit "all malt liquors."

15. Washington: Code 1912, tit. 267, § 45 (local option). "Intoxicating liquor" \* \* \* shall \* \* \* include whisky, brandy, rum, wine, ale, beer, or any spirituous, vinous, fermented, malt or any other liquor containing intoxicating properties \* \* \* except preparations compounded by a registered pharmacist, the sale of which would not subject him to the payment of the special liquor tax required by the laws of the United States."

Sess. Laws 1915, c. 2, § 2 (prohibition). "Intoxicating liquor" \* \* \* shall \* \* \* include whisky," etc., (as above) "and all liquids \* \* \* which contain any alcohol, which are capable of being used as a beverage." State v. Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962.

16. Wisconsin: Gen. Stat. 1911, § 1565c (local option). "Any spirituous, malt, ardent, or intoxicating liquors or drinks."

Pennell v. State, 141 Wis. 35, 123 N. W. 115, holds that the statute forbids fermented malt liquors containing alcohol whether intoxicating or not.

See, also, Montana, note (g) 2.

Note (d): 1. Connecticut Public Acts 1919, c. 241, p. 2917, defines intoxicating liquors: " \* \* \* All beer manufactured from hops and malt or from hops and barley, and all beer on the receptacle containing which the laws of the United States require a revenue stamp to be affixed, \* \* \* [but it] \* \* \* shall not include beverages which contain no alcohol. \* \* \*"

2. Delaware: Laws 1917, c. 10, p. 19 (local option enforcement), defines as follows: " \* \* \* All liquid mixtures \* \* \* containing so much as ½ of 1 per cent. of alcohol by volume shall be deemed liquors and shall be embraced in the word 'liquors' as hereinafter used in this act."

3. Florida: Acts Sp. Sess. 1918, c. 7736, § 7, as



in six states, 1 per cent. of alcohol; (e) in one state, the presence of the "alcoholic prin-

amended by Acts 1919, c. 7890, defines intoxicating liquor, which it prohibits, as all beverages containing "½ of 1 per cent. of alcohol or more by volume."

4. Georgia: Acts Sp. Sess. 1915, pp. 77, 79 (Park's Annotated Code Supplement 1917, Penal Code, § 448 [b]), defines "prohibited liquors" as " \* \* \* beer, \* \* \* near-beer, \* \* \* and \* \* \* beverages containing one-half of 1 per cent. of alcohol or more by volume."

5. Illinois: Rev. Stat. 1874, c. 43, § 1 ("Dramshop Act"), defines a dramshop as a place "where spirituous or vinous or malt liquors are retailed \* \* \* and intoxicating liquors shall be deemed to include all such liquors."

Hansberg v. People, 120 Ill. 21, 23, 8 N. E. 857, 858 (60 Am. Rep. 549). Indictment for selling "intoxicating liquors"; proof of selling "beer." The court said: "No evidence whatever was offered or admitted for the purpose of explaining or showing what 'beer' was made of, or what its characteristics were, or whether it was malt, vinous, spirituous or intoxicating."

Laws 1919, p. 931 (Search and Seizure Law). "'Intoxicating liquor or liquors' shall include all distilled, spirituous, vinous, fermented or malt liquors which contain more than one-half of 1 per cent. by volume of alcohol."

6. Indiana: Rev. Stat. 1881, § 2094. "Whoever \* \* \* sells \* \* \* any spirituous, vinous, malt, or other intoxicating liquors."

Kurz v. State, 79 Ind. 488, 490. "It devolves on the state, therefore, to prove that the beer sold was either a malt liquor or that it was, in fact, an intoxicating liquor."

Laws 1911, c. 119, § 29 (Saloon Regulation Act). "The words 'intoxicating liquors' shall apply to any spirituous, vinous or malt liquor, or to any intoxicating liquor whatever, which is used \* \* \* as a beverage and which contains more than one-half of 1 per cent. of alcohol by volume."

Laws 1917, c. 4, § 2 (Prohibition Act). "The words 'intoxicating liquor' as used in this act shall be construed to mean all malt, vinous, or spirituous liquor, containing so much as one-half of 1 per cent. of alcohol by volume."

7. Maine: Rev. Stats. 1916, c. 127, § 21 (Prohibition Act), declares "wine, ale, porter, strong beer, lager beer, and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, \* \* \* are declared intoxicating within the meaning of this chapter."

State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48, holds that cider comes within the act, whether or not it is in fact intoxicating.

State v. Piche, 98 Me. 348, 56 Atl. 1052, holds that in case of a liquor not enumerated the jury must find the question of intoxicating quality.

Laws 1919, c. 235, § 21, prohibits "as well as any beverage containing a percentage of alcohol, which by federal enactment, or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating."

8. Maryland: Laws Extra Session 1917, c. 13, § 1 (prohibition in Prince George county). "Malt liquors shall be construed to embrace porter, ale, beer and all malt or brewed drinks whether intoxicating or not containing as much as one-half of 1 per cent. of alcohol by volume; that the words 'intoxicating liquors' \* \* \* shall \* \* \* embrace both spirituous liquors and malt liquors and \* \* \* all liquid mixtures \* \* \* containing so much as one-half of 1 per cent. of alcohol by volume." See, also, note (c) 3, and note (h).

9. Minnesota: Gen. Stat. 1913, § 3188, and Gen. Stat. Supp. 1917, § 3161, provide that "the terms 'intoxicating liquor' and 'liquor' \* \* \* shall include distilled, fermented, spirituous, vinous, and malt liquor."

State v. Gill, 89 Minn. 502, 95 N. W. 449, held that

Note (e); See note (e) on following page.

only those malt liquors which were intoxicating were within the meaning of the act.

Laws 1919, c. 455, p. 537 (prohibition). "'Intoxicating liquor' and 'liquor' shall include and mean ethyl alcohol and any distilled, fermented, spirituous, vinous or malt liquor or liquid of any kind potable as a beverage, whenever any of said liquors or liquid contain one-half of 1 per cent. or more of alcohol by volume."

10. Missouri: Rev. Stat. 1909, § 7243. "If a majority of the votes \* \* \* shall be 'against the sale of intoxicating liquors,' it shall not be lawful for any person \* \* \* (to sell) \* \* \* any kind of intoxicating liquors or beverage containing alcohol in any quantity whatever." State v. Gamma, 149 Mo. App. 694, 129 S. W. 734; State v. Burk, 151 Mo. App. 188, 131 S. W. 883; State v. Wills, 154 Mo. App. 605, 136 S. W. 25.

Laws 1919, p. 414, § 15. "The phrases, 'intoxicating liquor,' or 'intoxicating liquors,' whenever used in this act shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, all alcoholic liquids \* \* \* which contain one-half of 1 per cent. of alcohol by volume: \* \* \* Provided, however, that when the above mentioned phrases \* \* \* are \* \* \* defined in the laws of the United States, then such definition by Congress shall supersede and take the place of the definition \* \* \* in this section."

11. Nebraska: Cobby's Compiled Stats. 1907, § 7161, forbids the sale of "malt, spirituous, or vinous liquors or any intoxicating drinks" without a license.

Luther v. State, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146, holds that all malt liquors fall within the meaning of the statute whether or not they are intoxicating.

Laws 1917, c. 187, § 1 (prohibition). "'Intoxicating liquors' \* \* \* embrace all malt, fermented, vinous or spirituous liquors, wine, porter, beer, ale, or any intoxicating drink, \* \* \* and all malt or brewed drinks, and all mixtures \* \* \* which will produce intoxication, and, in addition thereto, such liquors of a different character and not hereinbefore enumerated capable of use as a beverage containing over one-half of 1 per cent. of alcohol."

12. Nevada: Laws 1919, c. 1, § 1 (prohibition). "The word 'liquors' \* \* \* shall \* \* \* embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, \* \* \* and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; \* \* \* and all beverages containing so much as one-half of 1 per cent. of alcohol by volume, shall be deemed spirituous liquors." State v. Reno Brewing Co., 42 Nev. 397, 178 Pac. 902.

13. Oklahoma: Sess. Laws 1913, c. 26, § 6 (prohibition), defines intoxicating liquors as "spirituous vinous, fermented or malt liquors \* \* \* or any liquors \* \* \* which contain as much as one-half of 1 per cent. of alcohol measured by volume." See Laws 1917, c. 186.

Estes v. State, 13 Okl. Cr. 604, 166 Pac. 77, held that the state to secure conviction for violation of the act must prove either that the liquor contained more than one-half of 1 per cent. of alcohol or that it was in fact intoxicating.

14. Oregon: Laws 1905, c. 2 (local option), used only the term "intoxicating liquors."

State v. Carmody, 50 Or. 1, 91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828, held that the court will judicially recognize that "beer" is intoxicating in an indictment for selling "intoxicating liquors."

Laws 1915, c. 141, § 2, p. 151. "'Intoxicating liquor' \* \* \* embrace all spirituous, malt, vinous, fermented or other intoxicating liquors; and all mixtures \* \* \* which shall contain in excess of one-half of 1 per cent. of alcohol by volume, shall be deemed to be embraced within such term, independently of any other test of their intoxicating character."

15. Tennessee: Acts 1917, c. 4, p. 6 (Ann. Code,



ciple"; (f) and in two states, 2 per cent. of al-

1918, § 6798a34). Clubs, etc., may not have on their premises any liquor "containing more than one-half of 1 per cent. of alcohol."

16. Utah: Laws 1911, c. 106, § 2; Laws 1913, c. 81, § 2 (license laws). "Any spirituous, vinous, fermented or malt liquor that may be used as a beverage and produce intoxication."

Laws 1917, c. 2, § 2 (prohibition). "'Liquors' \* \* \* embrace all fermented, malt, vinous or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe, or any other intoxicating drink, \* \* \* and all malt or brewed drinks; and all liquids \* \* \* which will produce intoxication; \* \* \* and all beverages containing in excess of one-half of 1 per cent. of alcohol by volume."

17. Virginia: Code 1887, § 587 (local option). "Any wine, spirituous or malt liquors, or any mixture thereof."

Savage v. Com., 84 Va. 582, 619, 5 S. E. 563, 565, held that a sale of "ginger extract" in order to be illegal requires the proof that the extract is intoxicating.

Acts 1916, c. 146, § 1, p. 216. "Ardent spirits \* \* \* embrace alcohol, brandy, whisky, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe and all compounds, \* \* \* and all beverages containing more than one-half of 1 per cent. of alcohol by volume."

18. West Virginia: Code 1880, c. 32, § 1, as amended by Acts 1877, c. 107 (Code 1913, § 1113), prohibits the sale of "spirituous liquors, wine, porter, ale, beer, or any drink of a like nature \* \* \* and all mixtures \* \* \* known as 'bitters' \* \* \* which will produce intoxication \* \* \* shall be deemed intoxicating liquors."

State v. Oliver, 26 W. Va. 422, 427, 53 Am. Rep. 79, in a dictum declares that beer is prohibited, whether it is intoxicating beer or not.

Code 1906, c. 32, § 1, is substantially the same. "State v. Henry, 74 W. Va. 72 [81 S. E. 569], on indictment for selling 'intoxicating liquors,' held that evidence of sale of 'bevo' containing 1.31 per cent. of alcohol sufficient to sustain a conviction."

Acts 1913, c. 13, § 1 (Code 1913, § 1280). "'Liquors' \* \* \* embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, \* \* \* and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors, \* \* \* and all beverages containing so much as one-half of 1 per cent. of alcohol by volume."

Note (e): 1. California: Stat. 1911, c. 351, § 21 (local option and license). "'Alcoholic liquors' \* \* \* include spirituous, vinous and malt liquors, and any other liquor \* \* \* which contains 1 per cent. of alcohol or more."

People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121, held that the clause "and any other liquor \* \* \* which contains 1 per cent. or more, of alcohol" modified the enumerated liquors, so that a malt liquor containing less than 1 per cent. of alcohol and not intoxicating did not fall within the act.

2. Massachusetts: Rev. Laws 1902, c. 100, § 2 (local option and license). "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than 1 per cent. of alcohol by volume \* \* \* shall be deemed to be intoxicating."

Com. v. McGrath, 185 Mass. 1, 69 N. E. 340, held that cider fell within the act whether it contained 1 per cent. of alcohol or was intoxicating or neither.

Com. v. Bloss, 116 Mass. 56, held that a liquor not enumerated in the statute is not prohibited unless it falls within the general definition which is a question for the jury.

Rev. Laws Supp. 1908, c. 100, § 1, retains the same definition.

3. New Hampshire: Gen. Laws 1873, c. 109, § 15, restricted the sale of "lager beer or other malt liquors."

State v. Thornton, 63 N. H. 114, held that all malt liquors come within the meaning of the act whether or not they are intoxicating.

Supp. to Pub. Stat. and Sess. Laws 1901-1913, p. 7, defines intoxicating liquors as "all distilled liq-

\*286

cohol.(g) Thus in \*forty-two of the forty-eight states—Maryland appears in two classes above—a malt liquor containing over 2 per

uors, or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage \* \* \* containing more than 1 per cent. of alcohol, by volume."

Laws 1917, c. 147, § 60 (prohibition). "By the words spirit, liquor, spirituous liquor, intoxicating liquor \* \* \* [is meant] \* \* \* all distilled liquors or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage \* \* \* containing more than 1 per cent. of alcohol, by volume."

4. South Carolina: Rev. Stat. 1893, Crim. Stat. § 437; Code 1902, Crim. Code, § 555; Code 1912, Crim. Code, § 794—prohibit any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contain alcohol.

Acts 1917, No. 94, § 1, prohibits "any spirituous, malt, vinous, fermented, brewed, or other liquors and beverages or any compound or mixture thereof, which contains alcohol in excess of 1 per cent."

5. Vermont: Rev. Laws 1880, § 3800, prohibited the sale of cider at places of amusement.

State v. Spaulding, 61 Vt. 505, 17 Atl. 844, held that the prohibition covered all cider whether intoxicating or not.

Laws 1902, No. 90, § 1, p. 94 (Gen. Laws 1917, § 6452). "'Intoxicating liquors' \* \* \* shall mean ale, porter, beer, lager beer, cider, all wines, any beverage which contains more than 1 per cent. of alcohol by volume."

6. Wyoming: Comp. Stat. 1910, § 2833. "Any person \* \* \* who shall sell \* \* \* any liquors, either spirituous, vinous, fermented or malt without \* \* \* a license," etc.

Sess. Laws 1919, c. 25, § 2 (prohibition). "'Intoxicating liquor' \* \* \* include any distilled malt, spirituous, vinous, fermented or alcoholic liquor and all alcoholic liquids \* \* \* capable of being used as a beverage, which shall contain more than 1 per cent. of alcohol."

Note (f): North Dakota: Rev. Code 1895, § 7598, contains a proviso to the effect that fermented and alcoholic liquors containing less than 2 per cent. of alcohol by volume shall not be deemed to be intoxicating.

Laws 1897, c. 65, § 10, subd. 25. "Courts will take judicial notice that beer is a malt liquor and intoxicating."

State v. Currie, 8 N. D. 545, 80 N. W. 475 (1899), held that the statute meant that beer is to be presumed to be intoxicating until proved not to be so.

Rev. Code 1899, § 7598, prohibits "all spirituous, malt, vinous, fermented, or other intoxicating liquors or mixtures thereof, \* \* \* that will produce intoxication, or any liquors \* \* \* sold \* \* \* as a beverage and which shall contain \* \* \* methyl alcohol, \* \* \* amyl alcohol," etc.

State v. Virgo, 14 N. D. 293, 103 N. W. 610 (1905), held that the act only applied to such liquors as were in fact intoxicating.

Laws 1909, c. 187, p. 277. Intoxicating liquors include alcohol, brandy, rum, beer, ale, porter, wine, and hard cider, also all spirituous, malt, etc., liquors, which will produce intoxication in any degree, or any mixture of such or any kind of beverage whatsoever which while preserving the alcoholic principle or any other intoxicating quality may be used as a beverage and may become a substitute for the ordinary intoxicating beverages.

State v. Fargo Bottling Works, 19 N. D. 397, 124 N. W. 387, 26 L. R. A. (N. S.) 872, held that "Purity Malt" containing 1.75 per cent. of alcohol preserved "the alcoholic principle" and whether or not it was intoxicating it might not lawfully be sold.

Note (g): 1. Louisiana: Shreveport Ice Co. v. Brown, 128 La. 408, 54 South. 923, held that a statute regulating the sale of "spirituous and intoxicating liquors" includes only intoxicating liquors.

Acts 1910, No. 171, § 1, defines "grog-shop" as a

cent. of alcohol by weight or volume is deemed, for the purpose of regulation or prohibi-

\*287

tion, intoxicating as a \*matter of law. Only one state has adopted a test as high as 2.75 per cent. by weight or 3.4 per cent. by volume.(h) Only two states permit the question of the intoxicating character of an enumerat-

\*288

ed liquor to be put in issue.(i) In \*three other states the matter has not been made clear either by decision or legislation.(j) The deci-

place where "intoxicating, spirituous, vinous, or malt liquors are sold" (and forbids them in prohibition territory).

State v. Maroun, 128 La. 829, 55 South. 472, held that the malt liquors must be intoxicating to be within the meaning of the statute.

Acts 1914, No. 146, repeats a similar definition of grog-shop or blind tiger. Acts 1914, No. 211, forbids the manufacture of near-beer with more than 1.59 per cent. of alcohol by weight or 2 per cent. by volume, and prohibits the sale of the near-beer thus made under the same roof where any other beverage is sold.

State v. George, 136 La. 906, 67 South. 953, seems to hold that this near-beer may be sold in prohibition territory where the "grog-shops" are not allowed.

2. Montana: Laws 1917, c. 143, § 2. "Intoxicating liquors" \* \* \* include whisky, brandy, gin, rum, wine, ale, and any spirituous, vinous, fermented, or malt liquors \* \* \* or liquid \* \* \* which contain as much as 2 per cent. of alcohol by volume and which is capable of being used as a beverage."

State v. Centennial Brewing Co., 55 Mont. 500, 179 Pac. 296, holds specifically mentioned liquors prohibited regardless of alcoholic content.

Note (h): Rhode Island: Pub. Laws 1887, c. 634, § 2. "Intoxicating liquors" \* \* \* include ale, wine, rum, or other strong or malt liquors, or any liquor or mixture of liquors which shall contain more than 2 per cent. by weight of alcohol" and this is not to be construed to permit the sale of liquors containing less than 2 per cent. if intoxicating.

Public Laws 1919, c. 1740, § 1 (amending Gen. Laws, c. 123, § 1). "Nonintoxicating beverages" as used in this act, includes and means all distilled or rectified spirits, wines, fermented and malt liquors which contain one per centum and not more than four per centum by weight of alcohol.

"Sec. 2. No person shall manufacture or sell or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possessions or under his charge for the purposes of sale and delivery, any nonintoxicating beverages, unless as hereinafter provided."

"Sec. 5. The electors of the several cities and towns \* \* \* shall \* \* \* cast their ballots for or against the granting of licenses for the sale of nonintoxicating beverages pursuant to this act. \* \* \*"

Maryland: Laws 1918, c. 219, p. 530 (prohibiting at night the sale of intoxicating liquors to be carried away from the place of sale), expressly excludes from the operation of the act "malt liquors containing less than 4 per cent. of alcohol by weight."

This provision, however, is not attempting to make a classification of intoxicating liquors. For laws of this state which do that see note (c) 7, and note (d) 9.

Note (i): 1. Kentucky: Statutes 1903, § 2560, as amended by Laws 1906, c. 21, forbids the sale in dry territory of "spirituous, vinous or malt liquors."

City of Bowling Green v. McMullen, 134 Ky. 742, 122 S. W. 823, 26 L. R. A. (N. S.) 895, held that the liquors named must be intoxicating in fact to be forbidden by the act.

2. Texas: Rev. Stat. 1895, art. 5060a, taxes the selling of "spirituous, vinous, or malt liquors, or

sions of the courts as well as the action of the Legislatures make it clear—or, at least, fur-

\*289

nish ground upon which Congress \*reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors.(k)

Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, determined that state legislation of this character is valid

\*290

and set forth \*with clearness the constitutional ground upon which it rests:

"When a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as

\*291

it may deem necessary in order to make \*its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a

\*292

\*purpose within the admitted power of the government." 226 U. S. 201, 33 Sup. Ct. 46, 57 L. Ed. 184. "It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at

\*293

the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and pro-

\*294

cesses of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise." 226 U. S. 204, 33 Sup. Ct.

\*295

47, 57 L. Ed. 184. "The state, \*within the limited medicated bitters" capable of producing intoxication.

Ex parte Gray (Tex. Cr. App.) 83 S. W. 828, and Reisenberg v. State (Tex. Cr. App.) 84 S. W. 585, held that nonintoxicating malt beverages may be sold without a license.

Gen. Laws 1918, c. 24 (prohibition), uses the same terms as the older statute and is cumulative, so presumably it has the same meaning.

3. Louisiana: See note (f) 1. The test of 2 per cent. applies only to near-beer. Presumably a vinous liquor must be proved intoxicating in fact under the decisions.

Note (j): 1. New Jersey: Laws 1918, c. 2, § 1 (local option). "The term 'intoxicating liquor' \* \* \* shall mean any spirituous, vinous, malt, brewed, or any other intoxicating liquor."

No interpretations.

2. North Carolina: Sp. Sess. 1908, c. 71, § 1, prohibits the sale of "any spirituous, vinous, fermented, or malt liquors, or intoxicating bitters."

Pub. Laws 1909, c. 438, Schedule B, §§ 26, 63, imposed a license tax on the sale of near-beer or any drinks containing one-half of 1 per cent. alcohol or more.

Parker v. Griffith, 151 N. C. 600, 66 S. E. 565, and State v. Danenberg, 151 N. C. 713, 66 S. E. 301, 26 L. R. A. (N. S.) 890, held that the sale of near-beer containing 1½ per cent. of alcohol was lawful.

3. Pennsylvania: No definition.

Note (k): See note (b), supra.



its we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxi-

\*296

cants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power." 226 U. S. 205, 33 Sup. Ct. 47, 57 L. Ed. 184.

\*297

\*That the federal government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the states is obvious; and both this experience of the states and the need of the federal government of legislation defining intoxicating liquors as was done in the Volstead Act was clearly set forth in the reports of the House Committee on the Judiciary in reporting the bill to the 65th Congress, 3d Session, Report 1143, February 26, 1919, and to the 66th Congress, 1st Session, Report 91, June 30, 1919. Furthermore, recent experience of the military forces had

\*298

shown the necessity of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, c. 15, § 12, 40 Stat. 76, 82 (Comp. St. 1918, § 2019a). (l) And the Attorney General, calling attention specifically to the claim made in respect to the 2.75 per cent. beer, had pointed out to Congress that definition of intoxicating liquor by fixed standards was essential to effective enforcement of the prohibition law. (m)

Note (l): That statute made it "unlawful to sell any intoxicating liquor, including beer, ale or wine, to any officer or member of the military forces while in uniform." The Judge Advocate General, having been applied to for an opinion concerning its administration, advised that: In matters of military inquiry, the War Department regards a beverage that contains 1.4 per cent. of alcohol as intoxicating liquor within the meaning of section 12 of the Selective Service Act of May 18, 1917 (Comp. St. 1918, § 2019a), and the regulations of the President and the Secretary of War made thereunder; whether beverages are intoxicating liquors • • • in prosecution of civilians is a question for the civil courts. Opinions of Judge Advocate General 250. Dec. 4, 1918—Digest of 1918, p. 360. See, also, opinion of March 3, 1919—Digest of 1919, p. 289.

Note (m): Referring to the proposed definition: "I do not think the wisdom of such action on the part of Congress admits of doubt. It goes without saying, I think, that if a law merely prohibits intoxicating liquors and leaves to the jury in each case, from the evidence produced, to determine whether the liquor in question is, in fact, intoxicating or not, its efficient and uniform administration will be impossible. The term 'intoxicating' is too indefinite and uncertain to produce anything like uniform results in such trials. Of course, there are certain liquors so generally known to be intoxicating that any court would take judicial notice of this fact. But in the absence of a definition by Congress there will be innumerable beverages as to which the claim will be made that they do not contain enough alcohol to render them intoxicating. These contentions will produce endless confusion and uncertainty. These, I think, are sub-

\*299

It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as in its judgment are necessary to the effective administration of the law. The contention appears to be, that since the power to prohibit the manufacture and sale of intoxicating liquors is not expressly granted to Congress, but is a power implied under section 8 of article 1 of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" powers expressly enumerated, the power to prohibit nonintoxicants would be merely an incident of the power to prohibit intoxicants, and that it cannot be held to exist, because one implied power may not be grafted upon another implied power. This argument is a mere matter of words. The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred nonintoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors.

\*300

Likewise the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale. Furthermore, as stated in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, supra, while discussing the implied power to prohibit the sale of intoxicating liquors:

"When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power. \* \* \*

stantially the reasons why Congress should itself provide a definition.

"The importance of this matter has been very much emphasized by our present efforts to enforce the War Prohibition Act. The claim is being made that beer containing as much as 2½ per cent. of alcohol is not intoxicating. And if this must be made a question of fact to be decided by each jury, but little in the way of practical results can be expected. I am, however, most earnestly insisting that, in view of the rulings for many years by the Internal Revenue Department, Congress meant when it used the word 'beer' a beverage of the class generally known as beer if it contained as much as one-half of 1 per cent. of alcohol."

Letter of Attorney General to Senator Morris Shepherd, July 29, 1919, read in Senate, September 5, 1919, 58 Congressional Record, 5185.



The distinction sought to be made by plaintiff between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus, the Constitution confers upon Congress the express power "to establish post offices and post roads." Article I, § 8, cl. 7. From this is implied the power to acquire land for post offices in the several states, *Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. Ed. 670; and as an incident of this implied power to acquire land, the further power is implied to take it by right of eminent domain, *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449. Likewise, the Constitution confers by clause 3 the express power "to regulate commerce \* \* \* among the several states"; but there is implied for this purpose also the power to grant to individuals franchises to construct and operate railroads from state to state. *California v. Pacific Railroad Co.*, 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150. Incidental to this implied power to construct or authorize the construction of a railroad is the further implied power to regulate the relations of the railroad with its employés, *Second Employers' Liability Cases*, 223 U. S. 1, 47, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; to require safety appliances upon cars, even when used in intrastate commerce, *Southern Railway v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; and to regulate freight rates even to the extent of affecting intrastate rates, *American Express Co. v. Caldwell*, 244 U. S. 617, 37 Sup. Ct. 656, 61 L. Ed. 1352. Whether it be for purposes of national defense, or for

\*301

the purpose \*of establishing post offices and post roads, or for the purpose of regulating commerce among the several states, Congress has the power "to make all laws which shall be necessary and proper for carrying into execution" the duty so reposed in the federal government. While this is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers. In *re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the term "express and implied," the term "specific and general" had been used. For the power conferred by clause 18 of section 8 "to make all laws which shall be necessary and proper for carrying into execution" powers specifically enumerated is also an express power. Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective.

[3, 4] Second. Does the fact that title 1 of the Volstead Act took effect upon its passage render section 1 invalid as against the plaintiff? Prohibition of the manufacture of malt liquors with alcoholic content of one-half of 1 per cent. or more is permissible only

because, in the opinion of Congress, the war emergency demands it. If, in its opinion, the particular emergency demands the immediate discontinuance of the traffic Congress must have the power to require such discontinuance. To limit the power of Congress so that it may require discontinuance only after the lapse of a reasonable time from the passage of the act would seriously restrict it in the exercise of the war powers. Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the lawmaking body. That the prohibition of the manufacture of nonintoxicating beer, if permissible at all, may be made to take effect immediately follows necessarily from the principle acted upon in *Mug-*

\*302

*ler v. Kansas*, 123 \*U. S. 623, 669, 8 Sup. Ct. 273, 31 L. Ed. 205, since the incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the states' prohibition under the police power. In the *Mugler Case*, also, the breweries were erected at a time when the state did not forbid the manufacture of malt liquors, and there it was alleged that the prohibition, which became effective almost immediately, would reduce the value of one of the breweries by three-fourths and would render the other of little value. Here, as there, the loss resulting to the plaintiff from inability to use the property for brewery purposes, is an incident of the peculiar nature of the property and of the war need which, we must assume, demanded that the discontinuance of use be immediate. Plaintiff cannot complain because a discontinuance later would have caused him a smaller loss. This, indeed, appears to be conceded so far as concerns the brewery and appurtenances. The objection on the ground that the prohibition takes effect immediately is confined to the prohibition of the sale of the beer on hand at the time of the passage of the act. But as to that also we cannot say that the action of Congress was unreasonable or arbitrary.

Plaintiff contends however that even if immediate prohibition of the sale of its nonintoxicating beer is within the war power, this can be legally effected, only provided compensation is made; and it calls attention to the fact that in *Barbour v. Georgia*, 249 U. S. 454, 459, 39 Sup. Ct. 316, 63 L. Ed. 704, following some earlier cases, the question was reserved whether, under the police power, the states could prohibit the sale of liquor acquired before the enactment of the statute. It should, however, be noted that, among the judgments affirmed in the *Mugler Case*, was one for violation of the act by selling beer acquired before its enactment (see 123 U. S. 625, 627, 8 Sup. Ct. 273, 31 L. Ed. 205), and that it was assumed without discussion that the same rule applied to the brewery

and its product (123 U. S. 669, 8 Sup. Ct. 273, 31 L. Ed. 205). But we are not required to

**\*303**

determine here the limits \*in this respect of the police power of the states; nor whether the principle is applicable here under which the federal government has been declared to be free from liability to an owner, "for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency" (United States v. Pacific Railroad, 120 U. S. 227, 239, 7 Sup. Ct. 490, 495 30 L. Ed. 634); in analogy to that by which states are exempt from liability for the demolition of a house in the path of a conflagration (see *Lawton v. Steele*, 152 U. S. 132, 136, 14 Sup. Ct. 499, 38 L. Ed. 385); or for garbage of value taken (*Reduction Co. v. Sanitary Works*, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 26 Sup. Ct. 106, 50 L. Ed. 212); or for unwholesome food of value destroyed (*North American Storage Co. v. Chicago*, 211 U. S. 306, 39 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; *Adams v. Milwaukee*, 228 U. S. 572, 584, 33 Sup. Ct. 610, 57 L. Ed. 971), for the preservation of the public health. Here, as in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, supra, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

It is urged that the act is particularly oppressive in respect to the beer on hand, because the plaintiff was engaged in manufacturing and selling a nonintoxicating beverage expressly authorized by the President in his proclamation of December 8, 1917, and prohibited by him later, only when conservation of all the food products of the country became necessary. The facts afford no basis on which to rest the claim of an equity in the plaintiff's favor. The specific permission from the President to manufacture 2.75 per cent. beer was not on the ground that such beer was nonintoxicating; nor was it a declaration by him that this beer was in fact nonintoxicating. The permission extended to all "ale and porter" which, every one knows, are intoxicating liquors.<sup>(n)</sup> This permission

**\*304**

to \*make 2.75 per cent. beer was withdrawn December 1, 1918, under proclamation of September 16, 1918; and no permission to manufacture specifically 2.75 per cent. beer was ever thereafter given by the President. His later proclamation (March 4, 1919) merely limited the prohibition of the use of foodstuffs to use in the production of "intoxicating liquors." Whether 2.75 per cent. beer was intoxicating was thus left by the President, not only without a decision, but with-

out even an intimation. The statement of plaintiff that the 2.75 per cent. beer on hand was manufactured under permission of the President is wholly unfounded. It was not until July 1, 1919, when the War-Time Prohibition Act became operative in this respect that there was any prohibition of the sale of any liquors. So far as appears, all the beer which the plaintiff had on hand at the time of the passage of the Volstead Act was manufactured by the plaintiff long after the President had ceased to have any authority to forbid or to permit.

Decree affirmed.

Mr. Justice McREYNOLDS, with whom concurred Mr. Justice DAY, and Mr. Justice VAN DEVANTER, dissenting.

I cannot accept either the conclusion announced by the court or the reasons advanced to uphold it. The importance of the principles involved impels a dissent.

We are not now primarily concerned with the wisdom or validity of general legislation concerning liquors, nor with the intoxicating qualities of beer, nor with measures taken by a state under its inherent and wide general powers to provide for public safety and welfare. Our problem concerns the power of Congress and rights of the citizen after a

**\*305**

declaration of war, but when active \*hostilities have ended and demobilization has been completed.

The government freely admits, since the present cause stands upon motion to dismiss a bill which plainly alleges that the beer in question is nonintoxicating, we must accept that allegation as true and beyond controversy. In *United States v. Standard Brewery*, 251 U. S. 210, 40 Sup. Ct. 139, 64 L. Ed. —, decided this day, we rule in effect that for many months prior to the Volstead Act, passed October 28, 1919, no law of the United States forbade the production or sale of nonintoxicating malt liquors. And so the question for decision here distinctly presented, is this: Did Congress have power on October 28, 1919, directly and instantly to prohibit the sale of a nonintoxicating beverage, theretofore lawfully produced and which until then could have been lawfully vended, without making any provision for compensation to the owner?

The federal government has only those powers granted by the Constitution. The Eighteenth Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered "to declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"; and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. See, concerning implied

Note (n): Webster defines ale as "an intoxicating liquor made from an infusion of malt by fermentation and the addition of a bitter, usually hops," and porter as "a malt liquor, of dark color and moderately bitter taste, possessing tonic and intoxicating qualities."



powers, Cooley's Principles of Constitutional Law, 105; Story on the Constitution (4th Ed.) § 1243.

The argument runs: This court has held in *Hamilton, Collector, v. Kentucky Distilleries & Warehouse Co.*, decided December 8th, that under a power implied because necessary and proper to carry into execution the above named powers relating to war, in October,

\*306

1919, Congress could prohibit the sale \*of intoxicating liquors. In order to make such a prohibition effective the sale of nonintoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this nonintoxicant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc. The mischievous consequences of such reasoning were long ago pointed out in *Kidd v. Pearson*, 128 U. S. 1, 21, 9 Sup. Ct. 6, 10 (32 L. Ed. 346), where, replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

"The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"

For sixty years *Ex parte Milligan*, 4 Wall. 2, 120, 125 (18 L. Ed. 281), has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced, conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years,

\*307

sought to be avoided. Those great and \*good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more per-

nicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. \* \* \*

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell;

\*308

and that unlimited power, wherever lodged \*at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the judiciary disturb, except the one concerning the writ of habeas corpus."

By considering the circumstances existing when the War-Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton, Collector, v. Kentucky Distilleries & Warehouse Co.*, supra, this court asserted its right to determine the relationship between such an enactment and the conduct of war; the decision there really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war but depends upon some existing necessity directly related to actual warfare, was recognized. Treating that opinion as though it asserted the existence of a general power delegated to Congress to prohibit intoxicants, certain cases which declare our inability to interfere with a state in the exercise of its police power (*Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184; *Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, etc.) are now cited, and it is said they afford authority for upholding the challenged statute. But those cases are essentially different from the present one, both as to facts and applicable principles; the power exercised by the states was inherent, ever present, limited only by the Fourteenth Amendment, and there was no arbitrary application of it; the power of Congress recognized in *Hamilton, Collector, etc.*, and here relied up-



on, must be inferred from others expressly granted and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities and only so long as the relation-

\*309

ship continues. Whether these essentials existed when a measure was enacted or challenged, presents a question for the courts; and, accordingly, we must come to this ultimate inquiry: Can it be truthfully said, in view of the well-known facts existing on October 28, 1919, that general prohibition immediately after that day of the sale of non-intoxicating beer theretofore lawfully manufactured, could afford any direct and appreciable aid in respect of the war declared against Germany and Austria?

What were the outstanding circumstances? During the nineteen months—April, 1917, to November, 1918—when active hostilities were being carried on, and for almost a year thereafter, Congress found no exigency requiring it to prohibit sales of nonintoxicating beers. The armistice was signed and actual hostilities terminated November 11, 1918. Our military and naval forces, with very few exceptions, had returned and demobilization had been completed. The production of war material and supplies had ceased long before and huge quantities of those on hand had been sold. The President had solemnly declared:

"The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it."

Also:

"That the object of the war is attained."  
"The quiet of peace and tranquility of settled hopes has descended upon us."

July 10, 1919, he announced, "The war ended in November, eight months ago;" and in a message dated October 27, 1919, he declared that war emergencies which might have called for prohibition "have been satisfied in the demobilization of the army and

navy." Food supplies were abundant, and there is no pretense that the enactment under consideration was intended to preserve them. Finally, the statute itself contains no declaration that prohibition of nonintoxicants was regarded as in any way essential to the proper conduct or conclusion of the war or to restoration of peace.

\*310

\*Giving consideration to this state of affairs I can see no reasonable relationship between the war declared in 1917, or the demobilization following (both of which in essence, if not by formal announcement, terminated before October, 1919), or restoration of peace (whose quiet had already descended upon us) and destruction of the value of complainant's beverage, solemnly admitted in this record to be nonintoxicating and which it manufactured, held and desired to sell in strict compliance with the laws of New York. Nor can I discover any substantial ground for holding that such destruction could probably aid in an appreciable way the enforcement of any prohibition law then within the competency of Congress to enact. It is not enough merely to assert such a probability; it must arise from the facts.

Moreover, well settled rights of the individual in harmless property and powers carefully reserved to the states, ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it and always with a steadfast purpose to give complete effect to every part according to the true intentment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore:

"Nor shall any person \* \* \* be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Mr. Justice CLARKE also dissents.

(251 U. S. 311)

DUHNE v. STATE OF NEW JERSEY et al.

(Argued Jan. 5, 1920. Decided Jan 12, 1920.)

No. — Original.

1. COURTS ~~379~~—SUPREME COURT HAS NOT ORIGINAL JURISDICTION TO ENJOIN STATE AND FEDERAL OFFICIALS FROM ENFORCING PROHIBITION AMENDMENT.

Bill by a citizen of New Jersey to restrain United States officials and the state of New Jersey itself, its officers and agents, from directly or indirectly enforcing Const. Amend. 18, prohibiting the manufacture and sale of intoxicating liquors, on the ground the amendment was void from the beginning, and forms no part of the Constitution, so far as the controversy concerns officials of the United States, presents no question within the original jurisdiction of the Supreme Court.

2. COURTS ~~303~~(1) — SUIT BY CITIZEN AGAINST HIS STATE NOT WITHIN JUDICIAL POWER GRANTED BY CONSTITUTION TO UNITED STATES.

The whole sum of the judicial power granted by the Constitution to the United States does not embrace authority to entertain a suit brought by a citizen against his own state, without its consent.

3. COURTS ~~379~~—SUPREME COURT HAS NOT ORIGINAL JURISDICTION OF SUIT BY CITIZEN OF STATE TO ENJOIN IT FROM ENFORCING PROHIBITION AMENDMENT.

Despite Const. art. 3, § 2, conferring original jurisdiction on the Supreme Court in all cases in which a state shall be a party, the Supreme Court has no original jurisdiction of bill by a citizen of New Jersey to enjoin state and federal officials from enforcing Const. Amend. 18, prohibiting the manufacture and sale of intoxicating liquors, on the ground it is void and not a part of the Constitution, as a state is not subject to suit by its own citizen save by consent.

Application by William Duhne for leave to file bill for injunction against the State of New Jersey and others. On rule to show cause. Rule discharged, and permission to file denied.

Mr. Everett V. Abbot, of New York City, for complainant.

Mr. Thomas F. McCran, of Paterson, N. J., for defendant State of New Jersey.

Mr. Solicitor General Alexander C. King, of Atlanta, Ga., for other defendants.

\*312

\*Memorandum opinion by Mr. Chief Justice WHITE, by direction of the Court.

The complainant, a citizen of New Jersey, asked leave to file an original bill against the

\*313

Attorney General of the \*United States, the Commissioner of Internal Revenue thereof and the United States District Attorney for the District of New Jersey, as well as against

the state of New Jersey. The bill sought an injunction restraining the United States officials named and the state of New Jersey, its officers and agents, from in any manner directly or indirectly enforcing the Eighteenth Amendment to the Constitution of the United States, any law of Congress or statute of the state to the contrary, on the ground that that amendment was void from the beginning and formed no part of the Constitution.

Answering a rule to show cause why leave to file the bill should not be granted, if any there was, the defendants, including the state of New Jersey, denied the existence of jurisdiction to entertain the cause and this is the first question for consideration.

[1, 2] So far as the controversy concerns the officials of the United States, it is obvious that the bill presents no question within the original jurisdiction of this court, and in effect that is not disputed, since in substance it is conceded that the bill would not present a case within our original jurisdiction, if it were not for the presence of the state of New Jersey as a defendant. But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. Ed. 849; *California v. Southern Pacific Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535.

[3] It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of section 2, article 3, of the Constitution, confers original jurisdiction upon this court "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party.

\*314

\* \* \* " In \*other words, the argument is that the effect of the clause referred to is to divest every state of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced as follows:

"This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only." *Louisiana v. Texas*, 176 U. S. 1, 16, 20 Sup. Ct. 251, 256 (44 L. Ed. 347).

That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred.

As the want of jurisdiction to entertain the bill clearly results, it follows that the permission to file must be and it is denied, and our order is:

Rule discharged.

(251 U. S. 342)

MARYLAND CASUALTY CO. v. UNITED STATES.

(Argued Nov. 13, 1919. Decided Jan. 12, 1920.)

No. 73.

1. INTERNAL REVENUE § 7, 9—EXCISE AND INCOME TAX PROPER ON INCOME RECEIVED BY DOMESTIC CORPORATIONS.

Under Income Tax Act 1913, § 2, par. G, subd. (a), in view of subdivision (b), as well as under Excise Tax Act 1909, § 38, tax is on income received during the year, as regards domestic corporations.

2. INTERNAL REVENUE § 7, 9—PREMIUMS RECEIVED BY INSURER'S AGENTS "RECEIVED" BY IT WITHIN TAX LAWS.

Where insurer allows its agents to give 30 days for payment of premiums, and requires them on the 5th of each month to remit balance due it as shown by last preceding monthly statement rendered to it, premiums received by them, but not yet remitted to it, are "received" by it within Excise and Income Tax Acts, but not so as to premiums not yet paid to agents.

[Ed. Note.—For other definitions, see Words and Phrases, Received.]

3. INTERNAL REVENUE § 38—PETITION FOR REFUND PROPERLY DISMISSED THE AMOUNT ON WHICH TAX SHOULD BE BASED NOT BEING SHOWN.

Petition of insurance company for refund of excise and income tax is properly dismissed, the amount of premiums received by it or its agents, the proper basis for the tax, not being shown, though the company is allowed time therefor, but only the amount remitted to it by agents, claimed by it to be the proper basis, and the amount of premiums written by it,

claimed by the government to be the proper basis, and on which tax was paid.

4. INTERNAL REVENUE § 7, 9—RESERVE FUNDS REQUIRED BY STATE INSURANCE DEPARTMENT "REQUIRED BY LAW" WITHIN TAX ACTS.

Excise and Income Tax Acts, providing that, in determining net income of insurance companies to be taxed, any addition "required by law" to be made within the year to reserve funds may be deducted from gross income, applies to reserves required by rules and regulations of state insurance departments, when promulgated in the exercise of an appropriate power conferred by statute.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Required by Law.]

5. INTERNAL REVENUE § 7, 9—NATURE OF "RESERVE" OF INSURANCE COMPANIES WITHIN TAX ACTS STATED.

The term "reserve" or "reserves" in insurance law, relative to provisions of Excise and Income Tax Acts, allowing additions to "reserve funds," required by law, of insurance companies, to be deducted from income to be taxed, is technical, and in general means money which with accretions from interest, is set aside with which to mature or liquidate future unaccrued and contingent claims, and claims accrued, but indefinite as to amount or time of payment, and includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the liability reserve, but does not apply to funds to meet ordinary running expenses of the business, definite in amount and which must be currently paid by every company from its income, if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve.]

6. INTERNAL REVENUE § 7, 9—"RESERVE" IN REQUIREMENTS OF INSURANCE DEPARTMENTS OF VARIOUS STATES USED IN NONTECHNICAL SENSE AND NOT AS IN TAX ACTS.

"Reserves," required by insurance departments of various states to be maintained by insurance companies for payment of all claims and obligations, held used in a nontechnical sense, equivalent to assets, and when applied to ordinary expenses, not within the provisions of Excise and Income Tax Acts; such acts elsewhere allowing deductions for ordinary expenses when paid within the year.

7. INTERNAL REVENUE § 7, 9—DIMINUTION IN RESERVES OF INSURANCE COMPANY NOT TAXABLE UNLESS FREE ASSETS ARE THEREBY INCREASED.

Diminution in reserves of insurance company over that of preceding year is not taxable as income, in the absence of findings that it is thereby restored to the free beneficial use of the company in a real, rather than a mere bookkeeping, sense.



8. INTERNAL REVENUE ~~38~~—CLAIMS AGAINST UNITED STATES FOR REFUND OF TAXES BARRED BY FAILURE TO APPEAL TO COMMISSIONER OR TO SEASONABLY SUE.

Claims against the government for refund of parts of excise and income taxes paid *held* barred, under Rev. St. § 3226 (Comp. St., § 5949), by failure to appeal to the Commissioner of Internal Revenue, and, under section 3227 (Comp. St. § 5950), by failure to sue in two years after accrual of cause of action, and not extended by amended returns filed by Commissioner of Internal Revenue to increase the payment.

Appeal from the Court of Claims.

Suit by the Maryland Casualty Company against the United States. From an adverse judgment (52 Ct. Cl. 201), claimant appeals. Modified and affirmed, and remanded.

See, also, 52 Ct. Cl. 288; 53 Ct. Cl. 81.

\*344

\*Messrs. Burt E. Barlow and A. R. Serven, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Frierson, for appellee.

Mr. Justice CLARKE delivered the opinion of the Court.

Under warrant of the Act of Congress approved August 5, 1909 (36 Stat. c. 6, pp. 11, 113), the government collected from the claimant, a corporation organized as an insurance company under the laws of Maryland, an excise tax for the years 1909, 1910, 1911, and 1912, and, under warrant of the Act of Congress of October 3, 1913 (38 Stat. c. 16, pp. 114, 166), it likewise collected an excise tax for the first two months of 1913, and an income tax for the remaining months of that year.

This suit, instituted in the Court of Claims, to recover portions of such payments claimed to have been unlawfully collected, is here for review upon appeal from the judgment of that court.

The claimant was engaged in casualty, liability, fidelity, guaranty and surety insurance, but the larger part of its business was employers' liability, accident, and, in the later of the years under consideration in this case, workmen's compensation insurance.

By process of elimination the essential questions of difference between the parties ultimately became three, viz.:

(1) Should claimant be charged, as a part of its gross income each year, with premiums collected by agents, but not transmitted by them to its treasurer within the year?

(2) May the amount of gross income of the claimant be reduced by the aggregate amount of the taxes, salaries, brokerage and reinsurance unpaid at the end of each year, under the provisions in both the excise and income

\*345

\*tax laws allowing deductions of "net addition, if any, required by law to be made within the year to reserve funds"?

(3) Should the decrease in the amount of reserve funds required by law for the year 1913 from the amount required for 1912 be treated as "released reserve" and charged to the company as income for 1913?

Of these in the order stated.

[1, 2] Section 38 of the Excise Tax Act (36 Stat. 112) provides that every corporation, organized under the laws of any state as an insurance company "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business \* \* \* equivalent to one per centum upon the entire net income \* \* \* received by it from all sources during such year."

The Income Tax Act (38 Stat. 172) provides—section G, paragraph (a)—that the tax shall be levied upon the entire "net income arising or accruing from all sources during the preceding calendar year." But in paragraph (b), providing for deductions, gross income is described as that "received within the year from all sources." So that, with respect to domestic corporations, it is clear enough that no change was intended by the use of the expression "arising or accruing" in the Income Tax Act, and that the tax should be levied under both acts upon the income "received" during the year. *Southern Pacific Co. v. Lowe*, 247 U. S. 330, 335, 38 Sup. Ct. 540, 62 L. Ed. 1142.

The claimant did business in many states, through many agents, with whom it had uniform written contracts which allowed them to extend the time for payment of the premiums on policies, not to exceed thirty days from the date of policy, and required that on the 5th day of each calendar month they should pay or remit, in cash or its equivalent, the balance due claimant as shown by the last preceding monthly statement rendered to it.

\*346

\*Under the provisions of such contracts obviously the agents were not required to remit premiums on policies written in November until the 5th of January of the next year and on policies written in December not until the following February.

Much the largest item of the gross income of the company was premiums collected on policies of various kinds. Omitting reference to earlier and tentative returns by the claimant and amendments by the government, it came about that claimant took the final position that the only premiums with which it could properly be charged as net income "received by it \* \* \* during each year" were such as were collected and actually paid to its treasurer within the year. This involved omitting from gross income each year "premiums in course of collection by agents, not reported on December 31st," which varied in amount from \$584,000 in one year to \$1,020,000 in another. The amount, if deducted one year, might appear in the return of the

claimant for the next year, but the rate might be different.

The government, on the other hand, contended that the claimant should return the full amount of premiums on policies written in each year, whether actually collected or not.

The Court of Claims refused to accept the construction of either of the parties and held that the claimant should have returned, not all premiums written by it, but all which were actually received by it during the year and that receipt by its agents was receipt by the company, within the meaning of the act of Congress.

The claimant contends that premiums paid to its agents but not remitted to its treasurer were not "received by it during the year," chiefly for the reason that while in the possession of the agents the money could not be attached as the company's property (*Maxwell v. McGee*, 66 Mass. [12 Cush.] 137), and be-

\*347

cause money, while thus in the possession of agents was not subject to beneficial use by the claimant and therefore cannot, with propriety, be said to have been received by it, within the meaning of the act.

On the other hand it is conclusively argued: That payment of the premium to the agent discharged the obligation of the insured and called into effect the obligation of the insurer as fully as payment to the treasurer of the claimant could have done; that in the popular or generally accepted meaning of the words "received by it" (which must be given to them, *Maillard v. Lawrence*, 16 How. 251, 14 L. Ed. 925), receipt by an agent is regarded as receipt by his principal; that under their contract collected premiums in possession of the agents of the claimant were subject to use by it in an important respect before they were transmitted to the treasurer of the company, for the agency contract provided that "the agent will pay on demand, out of any funds collected by him for account of premium and not remitted to the company, such drafts as may be drawn on him by the company \* \* \* for the purpose of settling claims, deducting the amount from the next succeeding monthly remittance"; and that only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year into another.

[3] The claimant withheld from its returns collections in the custody of its agents at the end of each year, and because in its amendments the government had included all premiums written in each year whether or not collected, the Court of Claims, having reached the conclusion thus approved by us, allowed the claimant ninety days in which to show the amount of premiums received by it and its agents within each of the years in controversy, but the claimant failed to make

such a showing, and thereupon the court

\*348

treated the return of premiums \*written as the correct one and very properly, so far as this item is concerned, dismissed claimant's petition.

[4, 5] Second. In the same words the Excise and Income Tax Acts provide that "the net addition, if any, required by law to be made within the year to reserve funds" may be deducted from gross, in determining the amount of net, income to be taxed.

Finding its authority in this provision of the law the claimant in all of its returns treated as "reserves," for the purpose of determining whether the aggregate amount of them each year was greater or less than in the preceding year, and of thereby arriving at the "net addition to reserve funds" which it was authorized to deduct from gross income, the following, among others, viz.: "Reserve for unearned premiums," "special reserve for unpaid liability losses," and "loss claims reserve." Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the government, in its amended returns, allowed these two items, but rejected the third, "loss claims reserve."

The Court of Claims, somewhat obscurely, held that the third item should also be allowed. This "loss claims reserve" was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the insurance department of Pennsylvania, pursuant to statute, has at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in that state, "assets as reserves sufficient to cover outstanding losses," justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved.

\*349

\*But the Court of Claims approved the action of the government in rejecting other claimed deductions of reserves for "unpaid taxes, salaries, brokerage and reinsurance due other companies." The court gave as its reason for this conclusion that the "net addition, if any, required by law to be made within the year to reserve funds," which the act of Congress permitted to be deducted from gross income, was limited to reserves required by express statutory provision, and did not apply to reserves required by the rules and regulations of state insurance departments, when promulgated in the exercise of an appropriate power conferred by statute.

In this the Court of Claims fell into error. It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably



adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; *United States v. Birdsall*, 233 U. S. 223, 231, 34 Sup. Ct. 512, 58 L. Ed. 930; *United States v. Smull*, 236 U. S. 405, 409, 411, 35 Sup. Ct. 349, 59 L. Ed. 641; *United States v. Morehead*, 243 U. S. 607, 37 Sup. Ct. 458, 61 L. Ed. 926. The law is not different with respect to the rules and regulations of a department of a state government.

But it is contended by the claimant that it was required to provide "reserves" for the payment of the rejected items of liability: Because the Court of Claims found that pursuant to statutes the insurance department of Pennsylvania required the company, as a condition of doing business in that state, to keep on hand "assets as reserves" sufficient to cover all claims against the company "whether due or accrued"; because the department of New York required it to maintain "reserves sufficient to meet all of its accrued but unpaid indebtedness in each year"; and because the department of Wisconsin required it to carry "sufficient reserves to cover all of its outstanding liabilities."

#### \*350

\*Whether this contention of the claimant can be justified or not depends upon the meaning which is to be given to the words "reserve funds" in the two acts of Congress we are considering.

The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside—"reserved"—as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage.

[6] The requirements relied upon, of the insurance departments of New York, Pennsylvania and Wisconsin that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering; but plainly the departments, in these expressions used the word "reserves" in a nontechnical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for

#### \*351

the payment of all claims and obligations. The distinction between the "reserves" and general assets of a company is obvious and familiar and runs through the statements of claimant and every other insurance company. That provision for the payment of ordinary expenses such as we are considering was not intended to be provided for and included in "reserve funds" as the term is used in the acts of Congress is plain from the fact that the acts permit deductions for such charges from income if paid within the year, and the claimant was permitted in this case to deduct large sums for such ordinary expenses of the business—specifically, large sums for taxes. The claimant did not regard any such charges as properly covered by "reserves" and did not so include them in its statement for 1909. In its 1910 return "unpaid taxes" and "salaries" first appear as "reserves," and in 1911 "brokerage" and "reinsurance" are added. This earlier, though it is now claimed to have been an uninstructed or inexpert, interpretation of the language of the acts, was nevertheless the candid and correct interpretation of it, and the judgment of the Court of Claims in this respect is approved.

[7] Third. The year 1913 was the only one of those under consideration in which the aggregate amount of reserves which the claimant was required by law to keep fell below the amount so required for the preceding year. The government allowed only "unearned premium" and "unpaid liability loss" reserves to be considered in determining deductions. In 1913 the "unpaid liability loss reserve" decrease exceeded the "unearned premium reserve" increase by over \$270,000, and this amount the government added to the gross income of the claimant for the year, calling it "released reserve," on the theory that the difference in the amount of the reserves for the two years released the decrease to the claimant so that it could use it for its general purposes, and therefore constituted free income for the year 1913, in which the decrease occurred.

#### \*352

\*This theory of the government was accepted by the Court of Claims and the addition to the gross income was approved.

The statute does not in terms dispose of the question thus presented.



Reserves, as we have seen, are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific contingent liabilities. They are held, not only as security for the payment of claims, but also as funds from which payments are to be made. The amount "reserved" in any given year may be greater than is necessary for the required purposes, or it may be less than is necessary; but the fact that it is less in one year than in the preceding year does not necessarily show either that too much or too little was reserved for the former year. It simply shows that the aggregate reserve requirement for the second year is less than for the first, and this may be due to various causes. If, in this case, it were due to an overestimate of reserves for 1912 with a resulting excessive deduction for that year from gross income, and if such excess was released to the general uses of the company and increased its free assets in 1913, to that extent it should very properly be treated as income in the year in which it became so available, for the reason that in that year, for the first time, it became free income, under the system for determining net income provided by the statute, and the fact that it came into the possession of the company in an earlier year in which it could be used only in a special manner, which permitted it to become nontaxable would not prevent its being considered as received in 1913 for the purposes of taxation, within the meaning of the act.

The findings of fact in this case, however, do not show that the diminution in the amount of required reserves was due to excessive reserves in prior years or to any other cause by which the free assets of the

\*353

company were increased in the year 1913, and the following finding of fact makes strongly against such a conclusion:

"The decrease in employers' liability loss reserve for 1913, designated as 'released reserve,' did not in any respect affect or change claimant's gross income or disbursements, as shown by the state insurance reports."

It would not be difficult to suggest conditions under which the statutory permit to deduct net additions to reserve funds would result in double deduction in favor of an insurance company, but such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them to the free beneficial use of the company in a real, and not in a mere bookkeeping sense. If this seemingly favorable treatment of insurance companies is to be otherwise corrected or changed, it is for Congress, and not for the courts, to amend the law.

Since the findings of fact before us do not make the clear showing, which must

be required, that the statutory deduction of net reserves in prior years was restored to the free use of the claimant in 1913, it should not have been charged as income with the decrease in that year, and, on the record before us, the holding of the Court of Claims must be reversed.

[8] There remains the question as to the statute of limitations.

The government concedes that the case is in time with respect to the amended returns but claims that it is barred by R. S. §§ 3226, 3227, and 3228 (Comp. St. §§ 5949, 5950, 5951), with respect to taxes paid on the original returns for all of the years but 1913. The claimant made its original returns without protest except for the year 1909 and, without appeal to the Commissioner of Internal Revenue, voluntarily paid the taxes computed on them for each of the years. Payment was made for 1909 in June, 1910; for 1910 in June, 1911; for 1911 in

\*354

June, 1912; for 1912 in June, 1913. No claim for a refund of any of these payments was made until April 30, 1915, and then the claim was in general terms:

"For amounts paid by it in taxes which, through lack of information as to requirements of law or by error in computation, it may have paid in excess of the amount legally due."

This claim was rejected subsequent to the institution of this suit, which was commenced on February 8, 1916.

This statement shows the right of the claimant plainly barred by its failure to appeal to the Commissioner of Internal Revenue (R. S. § 3226 [this is fundamental, *King's County Savings Institution v. Blair*, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657]), and also by its failure to institute suit within two years after the cause of action accrued (R. S. § 3227).

The claimant contends that the amended returns filed by the Commissioner of Internal Revenue were not amendments or modifications of the original returns, but were based upon a different principle, and, within the scope of *Cheatham et al. v. United States*, 92 U. S. 85, 23 L. Ed. 561, constituted new assessments from which appeals were taken in time.

But they are denominated "amended returns," and while in dealing with the same items the basis of computation was in some cases varied, in each case the purpose and effect of them was to increase the payment which the claimant was required to make under the law and the payments made on the original returns were credited on the amounts computed as due on the returns as amended.

The inapplicability of *Cheatham et al. v. United States*, 92 U. S. 85, 23 L. Ed. 561, is obvious, and the contention that the filing of the amended returns constituted the be-

ginning of new proceedings which so superseded the original returns as to release the claimant from its entire failure to observe the statutory requirement for review of the

\*355

latter is so unfounded that we cannot consent to enter upon a detailed discussion of it. This conclusion renders section 14 of the Act of Congress of September 8, 1916 (39 Stat. 772, c. 463 [Comp. St. § 6336n]) inapplicable.

It results that the judgment of the Court of Claims is modified, and, as so modified, affirmed, and the case is remanded to that court for proceedings in accordance with this opinion.

(251 U. S. 317)

BIRGE-FORBES CO. v. HEYE.

(Argued Nov. 13 and 14, 1919. Decided Jan. 12, 1920.)

No. 76.

1. WAR ⚡10(2)—DISMISSAL OR SUSPENSION OF SUIT OF ALIEN ENEMY NOT NECESSARY.

Dismissal or suspension of suit is not required by the fact that plaintiff becomes an alien enemy by declaration of war after he has recovered judgment and defendant has taken the case to the Circuit Court of Appeals, but judgment may properly be affirmed, with the modification that it be paid over to the Alien Property Custodian; aid and comfort to the enemy, the only objection to such a judgment, thus being prevented.

2. JUDGMENT ⚡600½—FOR PART OF AWARDS PAID BY BROKER FOR DEFENDANT NOT CONCLUSIVE AGAINST PART NOT PAID UNTIL AFTER JUDGMENT.

Judgment limiting recovery by broker against his principal to the part of awards against broker for inferior quality of cotton sold by broker for principal, that the broker had paid, *held* not res judicata against validity of balance in action therefor after the same had matured by payment by broker.

3. DEPOSITIONS ⚡111(1) — OBJECTION TO TAKING PLAINTIFF'S DEPOSITION WAIVED.

Defendant's objection that plaintiff's deposition could not be taken *held* not open, in view of agreement waiving notice and copy, and providing that officer might take and return depositions on interrogatories, but not waiving commission.

4. WAR ⚡10(2)—DEPARTURE FROM PRESCRIBED MODE OF RETURN OF DEPOSITIONS EXCUSED BY WAR.

Departure from the mode of return prescribed by state statute of deposition taken in foreign country, namely, by officer who took it putting it in the mail, *held* excused; that course being impossible because of war, and he having transmitted it in the only practical way, through the American consul to the Department of State, and from there by mail.

5. LIMITATION OF ACTIONS ⚡108—FOREIGN STATUTE PRESCRIBING LIMITATION NOT APPLICABLE IN CASE OF ARBITRATION.

Finding that German Civ. Code, § 477, prescribing a limitation of six months for claims for defect of quality of goods sold, did not apply, where the claims had been submitted to arbitration and passed on, *held* warranted.

6. EVIDENCE ⚡84—FOREIGN MONEY PRESUMED OF PAR VALUE.

In the absence of evidence as to depreciation at the time plaintiff paid an award in German marks, the value of the mark was properly presumed to be at par.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Carl R. Heye against the Birge-Forbes Company. Judgment for plaintiff was modified and affirmed by Circuit Court of Appeals (248 Fed. 636, 160 C. C. A. 536), and defendant brings certiorari. Affirmed.

Mr. Henry O. Head, of Sherman, Tex., for petitioner.

Mr. Robert M. Rowland, of Ft. Worth, Tex., for respondent.

\*322

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by Heye, a cotton broker in Bremen, against the petitioner, a cotton exporter in Texas, to recover sums that Heye had to pay on its account. The payments were made upon cotton sold by Heye as the petitioner's agent, to different buyers, for alleged failure of the cotton to correspond to the description upon which the price was based. In pursuance of the contracts and the rules of the Bremen Cotton Exchange the claims of the buyers were submitted to arbitration, which resulted in awards against the plaintiff for a total of 312,749.30 German marks, alleged to be equal to about \$74,820.52. Before the present suit was brought another one had been carried to judgment in the same District, in which that amount was claimed. At that time Heye had paid only \$36,610.96 of the awards. The judge directed a verdict for the sum that the plaintiff had paid and another item not now in issue. Heye now has paid the whole and brings this suit to recover the amount of the later payment not embraced in the former judgment. He prevailed in the District Court, and the judgment was affirmed with a modification as to payment by the Circuit Court of Appeals. 248 Fed. 636, 160 C. C. A. 536. The main question on the merits is whether the former judgment was conclusive as to the validity of the awards, but that upon which the certiorari was granted was a preliminary one, as is shown by the fact that certiorari was denied in the former suit. 234 U. S. 759, 34 Sup. Ct. 676, 58 L. Ed. 1580. After the



\*323

case had been \*taken to the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration of war between Germany and the United States. The Circuit Court of Appeals, however, affirmed the judgment with the modification that it should be paid to the clerk of the trial court and by him turned over to the Alien Property Custodian, with further details not material here.

[1] Upon the last-mentioned question, although it seemed proper that it should be set at rest, we can feel no doubt. The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall speaking for the Court in *Owens v. Hanney*, 9 Cranch, 180, 3 L. Ed. 697; *Kershaw v. Kelsey*, 100 Mass. 561, 564, 97 Am. Dec. 124, 1 Am. Rep. 142. There is nothing 'mysteriously noxious' (*Coolidge v. Inglee*, 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger v. Abbott*, 6 Wall. 532, 536, 18 L. Ed. 939; *McConnell v. Hector*, 3 B. & P. 113, 114. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. When the alien enemy is defendant justice to him may require the suspension of the case. *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 22, 39 Sup. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323.

[2] On the merits the first question is whether the former judgment was conclusive as to the validity of the awards, assuming them to have been identified as the same that were sued upon in the former case. Taking merely the former declaration and judgment it could not be said with certainty that some of the awards might not have been held invalid and that the defendant had not satis-

\*324

fied the \*whole obligation found to exist. But we have before us the fact that the Court directed a verdict and the charge. From the latter, as also from the answer, apart from a general denial, it appears that the awards were dealt with as a whole and that the objections to them were general. The objections were overruled, and the Court assumed that the awards were obligatory, but cut down the amount to be recovered to the sum that had been paid. The case went to the Circuit Court of Appeals and the same things appear in the report of the case there. *Heye v. Birge-Forbes Co.*, 212 Fed. 112, 128 C. C. A. 628. (Certiorari denied. 234 U. S. 759, 34 Sup. Ct. 676, 58 L. Ed. 1580.) In the

present case both parties moved the Court to direct a verdict. *Beuttell v. Magone*, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; *Empire State Cattle Co. v. Atchison, Topeka & Santa Fé Ry. Co.*, 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70. Taking that and the fact that the same judge seems to have presided in both suits into account we should be slow to disturb his decision that the issue was determined in the former one if we felt more doubt than we do. But we are satisfied the decision of the two Courts below was right.

[3,4] We shall deal summarily with two or three highly technical arguments urged against the affirmation of the judgment. One is that the depositions of Heye and a witness were not returned as required by the Texas statute providing for taking them, with a suggestion that, as Heye was a party, his deposition could not be taken at all. As to the latter point it is to be noticed that it did not present an attempt to fish for information from the opposite party and that an agreement was made that "time notice and copy are hereby waived," and that "the officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived." Whatever may be the general rule (as to which see *Blood v. Morrin* [C. C.] 140 Fed. 918), we think that this objection is not fairly open. As to the mode of return not having followed strictly the

\*325

Texas \*statute, because the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelopes that he had done so, a sufficient answer is that that course was impossible owing to the war, and that the officer did transmit the depositions in the only practicable way. He gave them to an American consul and had them transmitted to the Department of State and then through the mail to the clerk. The integrity of the depositions is not questioned, the statute was complied with in substance, and justice is not to be defeated now by a matter of the barest form.

[5,6] We see no error in the finding that section 477 of the German Civil Code did not bar the claim. Assuming the question to be open the Court was warranted in finding that a six months' limitation to claims for defect of quality did not apply where the claims had been submitted to arbitration and passed upon. The same is true with regard to the taking the value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments. On the whole case our conclusion is that the judgment should be affirmed.

Judgment affirmed.



(251 U. S. 326)

NORTHERN PAC. RY. CO. v. UNITED STATES. SEABOARD AIR LINE RY. v. SAME. NEW YORK CENT. & H. R. R. CO. v. SAME. KANSAS CITY, M. & O. RY. CO. OF TEXAS v. SAME.

(Argued Dec. 17, 18 and 19, 1919. Decided Jan. 12, 1920.)

Nos. 109, 132, 133, and 232.

**1. POST OFFICE**  $\Rightarrow$ 21(4)—POSTMASTER GENERAL MAY REFUSE TO PAY MAXIMUM RATE FOR CARRYING MAILS.

Under Rev. St. § 3999 (Comp. St. § 7478), the Postmaster General, if it seems to him reasonable to do so, may refuse to pay the maximum rates for the carriage of the mails, prescribed by Act June 8, 1872, § 211, Rev. St. § 3998, and section 4002 (Comp. St. § 7483), and insist upon some lesser rate as a condition of dealing with a road.

**2. POST OFFICE**  $\Rightarrow$ 21(4)—PRESCRIBED RATES FOR CARRYING MAILS HELD MAXIMUM RATES.

Act July 12, 1876, and Act March 2, 1907, reducing the compensation for the carriage of the mails by 10 and 5 per cent., respectively, from the rates fixed and allowed, merely reduced the maximum rates prescribed by Act March 3, 1873, and did not fix the reduced rates as the rates to be paid.

**3. POST OFFICE**  $\Rightarrow$ 21(4)—DETERMINATION OF RAILROAD'S COMPENSATION FOR CARRYING MAILS BY DIVIDING WEIGHT BY NUMBER OF DAYS INCLUDING SUNDAYS PROPER WHERE ORDERED BY POSTMASTER GENERAL AND ACCEPTED BY ROADS.

Despite Act March 2, 1907, where the Postmaster General, under Act March 3, 1873, by Order No. 412, of June 7, 1907, directed that, when the weight of mail is taken on railroad routes, the whole number of days included in the weighing period, and not merely the number of working days, excluding Sundays, should be used as a divisor for obtaining the average weight per day to determine the railroad's compensation, and railroads accepted a proposed contract for the carriage of mails, knowing that such divisor had been employed, they are entitled to receive only compensation so determined, either on the theory that the Postmaster General had authority to make the direction, as held by four justices, or on the theory that, having accepted the contract with knowledge of the order, they were bound by it, as held by two justices.

Mr. Justice Day and Mr. Justice Van Devanter, dissenting.

**Appeals from Court of Claims.**

Claim by the Northern Pacific Railway Company and others against the United States. From adverse judgments of the Court of Claims (53 Ct. Cl. 258), claimants appeal. Judgments affirmed.

\*328

\*Messrs. Alexander Britton, of Washington, D. C., C. W. Bunn, of St. Paul, Minn., and Evans Browne, of Washington, D. C., for appellant Northern Pac. Ry. Co.

Mr. Benjamin Carter, of Washington, D. C., for appellant Seaboard Air Line Ry.

Messrs. Frederic D. McKenney, J. Spalding Flannery, W. C. Carpenter, and G. B. Craighill, all of Washington, D. C., for appellant New York Cent. & H. R. R. Co.

Mr. F. Carter Pope, of Washington, D. C., for appellant Kansas City, M. & O. Ry. Co. of Texas.

Mr. Solicitor General Alex. C. King, of Atlanta, Ga., and Mr. La Rue Brown, of Boston, Mass., for the United States.

Mr. Justice HOLMES announced the judgment of the Court and delivered the following opinion, concurred in by the CHIEF JUSTICE and Justices BRANDEIS and CLARKE.

These are claims for compensation for carrying the mails above the amounts allowed and paid by the Postmaster General. The four cases are independent of one another,

\*329

but as the claims all depend for their validity upon a denial of the Postmaster General's power to pass a certain order they may be considered together. They were rejected by the Court of Claims. The question shortly stated is this: The pay for carrying the mails is determined by the average weight carried. To ascertain this average the mails are weighed for a certain number of consecutive days, and for some time before 1907 the total weight was divided by the number of working days—if the number of days was thirty-five it was divided by thirty, if one hundred and five by ninety. But on June 7, 1907, the Postmaster General issued an order, No. 412, "that when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." This of course diminishes the average weight and therefore the pay of the railroads. They deny the authority of the Postmaster General to make the change and sue for the additional sum that under the old practice they would have received.

[1] The texts to be discussed begin with an Act of 1873, but it should be observed as furnishing a background for that and the following statutes that from the beginning of the Government the Postmaster General, as the head of a great business enterprise always has been entrusted, as he must be, with a wide discretion concerning what contracts he should make, with whom and upon what terms. It is needless to go into the early statutes or to do more than to refer to Rev. Stat. § 3999 (Comp. St. § 7478), which authorizes him to make other arrangements if he cannot contract for the carriage of the mail upon a railway route at a compensation not exceeding the maximum rates then established, or for what he deems reasonable and fair. The limitations upon the power were in the interest of the business, the principal one being that the pay per mile per

annum should not exceed certain rates. Act of June 8, 1872, c. 335, § 221, \*17 Stat. 283, 309, Rev. St. § 3998, and section 4002 (Comp. St. § 7483). The language plainly showed and the decisions have established that the Postmaster General if it seemed to him reasonable, could refuse to pay the maximum and insist upon some lesser rate as a condition of dealing with a road. *Atchison, Topeka & Santa Fé Railway Co. v. United States*, 225 U. S. 640, 649, 32 Sup. Ct. 702, 56 L. Ed. 1236.

[2] The Act of March 3, 1873, c. 231, 17 Stat. 556, 558, appropriates five hundred thousand dollars, or so much thereof as may be necessary, "for increase of compensation for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned." Then, after providing for due frequency and speed and suitable accommodations for route agents—matters on which obviously the Postmaster General is the person to be satisfied—it enacts that "the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars," &c., &c. So far it will be seen that although the object is to permit an increase of compensation still the discretion of the Postmaster General under the earlier acts remains and that he could decline to pay the maximum rates however ascertained, or any sum greater than he should deem reasonable. It is argued, to be sure, that the rates were fixed at the maximum, and the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, reducing the compensation "ten per centum per annum from the rates fixed and allowed" is thought to help the conclusion. But no argument can obscure the meaning of the words "shall not exceed." The rates were fixed and reduced in their maxima but that was all that was done with regard to them. *United States v. Atchison, Topeka & Santa Fé Ry. Co.*, 249 U. S. 451, 454, 39 Sup. Ct. 325, 63 L. Ed. 703. The question is whether for any reason the control over the compen-

\*331

sation thus undeniably given to him \*without imposing any downward limit as to the money rates, is wholly withdrawn from his judgment in the preliminary stage of determining the basis to which the money rates are to be applied.

[3] The next words of the statute are: "The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times," &c., "and the result to be stated and verified in such form and manner as the Postmaster General may direct." The pay it will be remembered was to be per mile per annum, and as it was not practicable to weigh all the mails throughout the year and so to find out the total actual weight of the

mails and the exact number of miles that they were carried in the year, the result had to be arrived at approximately by finding the average weight carried on days assumed to resemble the other days of the 365. The average to be reached was not an average for the thirty days but an average weight per day for the year. This interpretation is shown to be the understanding of Congress by the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, which reduces the compensation ten per centum per annum from the rates fixed and allowed by the Act of 1873 "for the transportation of mails on the basis of the average weight." This must mean the average weight for the year concerned. Again by the Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, "the average weight (i. e., of course, the average weight for the year) shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety," &c., the increase in the number of days manifestly being for the purpose of more nearly hitting the average for the whole time. The statutes do not mention the divisor to be used in order to get the average desired. In 1873 mails were not carried on Sundays except over a comparatively small proportion of routes and therefore six was the fairest

\*332

single divisor. \*Now, on the other hand, it is said that the mileage of the seven-day routes is much greater than that of the six days. Therefore now to weigh for Sundays as well as other days and to divide by seven, is the fairest single rule that can be found.

But it is said that when an average is directed to be reached by weighing for say thirty working days it is implied that you are to get the average by using the number of working days on which the mails were weighed as a divisor, that working days mean week days, and that if in fact Sundays are used as working days, the divisor is not affected because the statute only contemplated six for a week. But the supposed implication of the statute disappears when it is remembered that the average wanted is not the average for the weighing days only but the average for the year. It is plain too that, whether "working days" be read to mean week days or the days on which work was done in fact, the statute contemplates the working days and the weighing days as identical and therefore affords no ground for demanding the advantage of a dividend of seven and a divisor of six, which is what the railroads want.

Various make-weights are thrown in to help the construction desired by the roads but they seem to us insufficient to change the result that is reached by reading the words. It is said that down to 1907 the Post Office Department construed the acts of 1873 and after as entitling the railroads to the maximum rates for full service as defined and to the minimum divisors and



that this construction must be taken to have been adopted in silence, by the later statutes. But the exercise of power in the way deemed just while the conditions stated to have existed in and after 1873 continued was not a construction but the exercise of discretion in determining the amount of pay—a discretion which, as we have seen, undeniably was given in the form of a right

\*333

to regulate rates, and which therefore there could be no reason for withholding, beyond the express words of the act, at the other end. It is true that in 1884 an Assistant Attorney General gave an opinion that any departure from the practice would defeat the intention of the law and cause no little embarrassment and that thereafter an order made by a previous Postmaster for taking the number of weighing days as the divisor was revoked. But the letter of the Postmaster General thus answered merely stated what had been the practice as to the divisor and asked whether it was in violation of law. It did not state that the Post Office considered itself bound to follow that way. The order that was revoked only purported to affect seven-day routes and is of little or no importance to the question before us now.

It is said that the rate was fixed by the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, if not before, by a reduction to "five per centum less than the present rates" on certain routes. But as we have stated we understand this to mean a reduction of the rates fixed by statute, that is the maximum rates. We do not understand it to refer to rates specifically allowed. It is not likely that Congress considered the latter in detail.

Finally much is made of the fact that before the passage of the Act of March 3, 1905, and again before the passage of the Act of March 2, 1907, provisos were stricken out that in effect required the divisor to be the number of the weighing days. A similar thing happened before the passage of the act making appropriations for the fiscal year ending June 30, 1909. We do not go into the particulars of these matters because whatever may have been said by individuals the provisos might as well have been rejected for the purpose of leaving the choice between the two divisors to the judgment of the Postmaster General as for any other reason. On the other hand we are not dis-

\*334

posed to lay much stress on the fact that the appropriations by Congress accepted the Postmaster General's estimates even when it had been notified that the Railroads were dissatisfied with Order No. 412. The Act of March 3, 1875, c. 128, 18 Stat. 340, 341, ordered the Postmaster General to have the weighing done thereafter by the employés of the Post Office Department, and to "have the weights stated and verified to him by said employés under such instructions as he may consider just to the Post Office Department and the railroad companies." Possi-

bly this might be construed to recognize the power now in dispute but this suggestion also we are content to leave on one side. We also leave unconsidered the great difficulties that the Railroads encounter in the effort to show that their conduct did not amount to an acceptance of the Postmaster General's terms within the decision in *New York, New Haven & Hartford R. R. Co. v. United States*, Dec. 8, 1919, 251 U. S. 123, 40 Sup. Ct. 67, 64 L. Ed. —. The construction of the statutes disposes of all the cases without the need of going into further details.

Judgments affirmed.

Mr. Justice DAY and Mr. Justice VAN DEVANTER dissent. Mr. Justice McREYNOLDS took no part in the decision of the cases.

Mr. Justice PITNEY, with whom concurred Mr. Justice McKENNA.

I concur in the affirmance of the judgments of the Court of Claims in these cases, but upon grounds somewhat different from those expressed in the opinion of Mr. Justice HOLMES.

All the claims arose under the law as it stood after the Act of March 2, 1907 (chapter 2513, 34 Stat. 1205, 1212), and before that of July 28, 1916 (chapter 261, 39 Stat. 412, 429), by which the carriage of mail matter by the railways was made compulsory. The Act

\*335

about which the principal controversy turns is that of March 3, 1873 (chapter 231, 17 Stat. 556, 558), the disputed portion of which was carried into section 4002, Rev. Stat. U. S. By it the Postmaster General was "authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned: \* \* \* Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; \* \* \* five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, \* \* \* and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

In my opinion, the rates of pay per mile per annum were maximum rates, and the Postmaster General had a discretion to contract at less if the railroads agreed; but under section 210 of the Act of June 8, 1872 (chapter 335, 17 Stat. 283, 309; Rev. Stat. U. S. § 3997), he was under a duty to arrange the routes into classes according to the size of the mail, and the speed, frequency, and importance of the service, "so that each



railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

But I think that in the clause "the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty," etc., the words "successive working days," by proper interpretation mean successive week days; and since the aggregate weight for the weighing period must be subjected to division in order to

\*336

ascertain the \*average weight per day, it naturally follows that the divisor should be the same number of "working days" (that is, week days) that are included in the period. The previous history of the mail service shows abundant reason for this, and for more than thirty years thereafter the provision was uniformly so construed by the Department. Upon a large number of the railway routes, mails were carried six days each week, none being carried on Sunday; while on other routes they were carried on every day in the week. The aggregate weight of mails carried was not affected by the frequency of the service, since the six-day routes carried the Sunday accumulations on Mondays. This explains why a certain number of "working days" (week days) was made the measure of the weighing period, and at the same time shows that the week-day divisor was necessary in order to deal equitably with both the six-day and the seven-day routes. From the passage of the act of 1873 down to the promulgation of Order No. 412 in the year 1907, the practice of the Department was in accord with the above interpretation. It was explained in a communication from the Postmaster General to the Senate January 21, 1885 (Senate Ex. Doc. No. 40, 48th Cong., 2d Sess., p. 68):

"The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay. It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit

\*337

the absurdity of putting a \*premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered. The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would

operate as a fine on all those roads carrying the mails daily, including Sunday."

The Act of March 3, 1905 (chapter 1480, 33 Stat. 1082, 1088), changed the minimum weighing period so as to require the inclusion of at least ninety, instead of thirty, successive working days, but made no other change. Under this act 105 calendar days necessarily were included in the weighing period in order to take in 90 successive working days. In my opinion, this act, like that of 1873, by fair construction required that the week-day divisor be employed. And so it was officially construed until 1907.

But, while I regard this method of determining the average weight to have been prescribed, and not left to the discretion of the Postmaster General, still I think the statute in this respect was only directory, and not mandatory. Considering the provision in its relation to the context and subject-matter, it will be seen to be but an aid to the making of fair contracts within the maximum rates allowed, and an aid to the Postmaster General in fixing the rate of compensation upon land grant routes, and in so arranging routes that each railway company shall receive a proportionate and just rate of compensation according to the service performed. Hence it seems to me that a failure strictly to comply with the prescribed method of ascertaining the average weight did not of itself render the action of the Postmaster General ultra vires and void.

\*338

\*The principal controversy in the present cases is over his Order No. 412 (June 7, 1907), which provided:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

While I regard it as embodying an erroneous view of the statute, this is not sufficient, in my opinion, to vitiate a contract voluntarily made by a railway mail carrier based upon a calculation of average weight made and known to have been made in conformity with the order. All the present claims originated after the promulgation of the order, and arose out of the carriage of mails under arrangements made with the Postmaster General after express notice of its provisions.

It is contended that, although the act of 1873 (Rev. Stat. U. S. § 4002 [Comp. St. § 7483]), in providing that the pay per mile per annum should "not exceed" the specified rates, conferred upon the Postmaster General a discretion to pay less rates, this was modified by the language of the Act of July 12, 1876 (chapter 179, 19 Stat. 78, 79), which reduced the compensation 10 per centum from "the rates fixed and allowed \* \* \* [by the act of 1873] for the transportation of mails on the basis of the average weight"; by that of the Act of June 17, 1878 (chapter 259, 20 Stat. 140, 142), where, however, the

expression is, "by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed," etc.; or by the provision of the Act of March 2, 1907 (chapter 2513, 34 Stat. 1205, 1212), readjusting compensation on railroad routes carrying an average weight per day exceeding 5,000 pounds, "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows," etc. I am not convinced that these amend-

\*339

ments, or any of them, had the effect of impliedly repealing that part of the act of 1873 (Rev. Stat. U. S. § 4002) "shall not exceed," etc., from which alone, in my view, the Postmaster General derived any serviceable discretion about readjusting the compensation.

Therefore he still had liberty of action within the maximum rates prescribed. And the railroad companies, other than such as had been aided by grants of lands or otherwise, were free to carry the mails at rates offered, or refuse them, as they chose. *Eastern R. R. Co. v. United States*, 129 U. S. 301, 306, 9 Sup. Ct. 320, 32 L. Ed. 730; *Atchison, T. & S. F. Ry. v. United States*, 225 U. S. 640, 650, 32 Sup. Ct. 702, 56 L. Ed. 1236; *Dellaware, L. & W. R. R. Co. v. United States*, 249 U. S. 385, 388, 39 Sup. Ct. 348, 63 L. Ed. 659; *New York, New Haven & Hartford R. R. Co. v. United States* (December 8, 1919) 251 U. S. 123, 40 Sup. Ct. 67, 64 L. Ed. —.

Furthermore, by section 212 of the Act of June 8, 1872 (chapter 335, 17 Stat. 283, 309; Rev. Stat. U. S. § 3999), if, because of the refusal of the railway companies, the Postmaster General was unable to make contracts at a compensation "not exceeding the maximum rates," or for what he deemed a reasonable and fair compensation, he was at liberty to use other means of carriage.

From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cl. 258, 308, 315, 318, 319) that the contracts arose, not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order, but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No.

\*340

\*412, as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming

certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. Had they refused to carry the mails on the terms proposed, he might have exercised his discretion as to the rate of pay per mile, so that, instead of agreeing to give them, as he did, the maximum pay based on the average weight ascertained under Order No. 412, he might have acceded to their contention by employing the week-day divisor, but have carried into effect his own view as to the amount that ought to be allowed by reducing the rate of pay per mile. Or, as already shown, he might have refused to make the contracts and have proceeded under section 3999.

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Cl. 258, 308, 313, 315, 318, 319).

Some of the routes of the Seaboard Air Line and of the Northern Pacific Railway Company were over lines that had been aided by government land grants, and hence

\*341

\*were subject to provisions of law summed up in section 214 of the Act of June 8, 1872 (Rev. Stat. U. S. § 4001 [Comp. St. § 7482]), by which they were obliged to "carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation." The Seaboard Air Line makes no point of this; but in behalf of the Northern Pacific it is contended that claimant, not being in the position of a free agent, ought not to be regarded as having voluntarily accepted the terms proposed by the Postmaster General. But the effect of the findings is that it did so accept; and this result cannot be overturned by raising an argument about the circumstances that went to make up the evidence upon which the findings were based, and the present contention amounts to no more than this.

Were it otherwise, nevertheless it appears that Congress had not provided the compensation for the land grant routes, except that it had authorized and directed the Postmaster General to readjust all railway mail pay



in the manner set forth in section 4002 and within the maxima prescribed therein and in the amendatory acts of 1876, 1878, and 1907, above mentioned, and had provided by section 13 of the Act of July 12, 1876 (chapter 179, 19 Stat. 78, 82 [Comp. St. § 7485]), "That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this Act," besides other legislation concerning the land grant routes that may be referred to, but need not be recited. Acts of March 2, 1907 (chapter 2513, 34 Stat. 1205, 1212); May 12, 1910 (chapter 230, 36 Stat. 355, 362); July 28, 1916 (chapter 261, 39 Stat. 412, 426). Assuming, therefore, that there was no contract affecting the land grant lines of the Northern Pacific, their compensation must be at the rate fixed by

\*342

the Postmaster General in the exercise of the power and discretion conferred upon him by this legislation; and so long as he exercised this power and discretion reasonably, not fixing a noncompensatory rate or otherwise acting arbitrarily, the carrier was concluded by his action. There is no finding that he acted arbitrarily; on the contrary, he had in support of Order 412 a considered opinion of the Attorney General under date September 27, 1907 (26 Ops. Atty. Gen. 390); and, so far as appears, he treated the land grant routes like others, not reducing them below the 80 per centum contemplated by section 13 of the act of 1876, or otherwise violating the statutes. There is no finding nor any contention that the amounts allowed them were not compensatory; and, upon the whole, it seems to me that, although he erred in failing to apply the week-day divisor to the weighings, this did not render the readjustment based thereon wholly void, or permit the carrier, after transporting the mails and accepting the stated compensation without further objection, afterwards to treat the readjustment orders as nullities.

Mr. Justice McKENNA concurs in this opinion.

(251 U. S. 315)

WESTERN UNION TELEGRAPH CO. v. BOEGLI.

(Submitted Dec. 19, 1919. Decided Jan. 12, 1920.)

No. 83.

1. COMMERCE — 12 — INTERSTATE COMMERCE  
ACT NOT CONSTRUED TO PRESERVE POWER OF STATES.

Act June 18, 1910, amending the Act to Regulate Commerce, is not to be narrowly construed, so as to preserve any reserved power of the states; such power being in its nature federal, and open to exercise by the states only because of inaction by Congress.

2. COMMERCE — 12 — FEDERAL ENACTMENT  
PRECLUDING EXERCISE OF REGULATIVE POWER BY STATES.

The provisions of Act June 18, 1910, amending the Act to Regulate Commerce, to bring telegraph companies under the act, as well as to place them under the administrative control of the Interstate Commerce Commission, so clearly established the purpose of Congress to subject such companies to a uniform national rule as to render it certain there was no room subsequently for exercise by a state of regulative power, by penalizing any negligent failure to deliver promptly an interstate telegram.

In Error to the Supreme Court of the State of Indiana.

Action by Peter Boegli against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appealed to the Supreme Court of Indiana, which affirmed (115 N. E. 773), and defendant brings error. Reversed and remanded for further proceedings not inconsistent with the opinion.

Messrs. Rush Taggart and Francis Raymond Stark, both of New York City, Samuel O. Pickens, Charles W. Moores, and Robert Franklin Davidson, all of Indianapolis, Ind., for plaintiff in error.

Mr. Arthur W. Parry, of Ft. Wayne, Ind., for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The Telegraph Company challenged the right to subject it to a penalty fixed by a law of Indiana for failure to deliver promptly in that state a telegram sent there from a point in Illinois, on the ground that the Act of Congress of June 18, 1910 (36 Stat. 539, 545, c. 309), amending the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), had deprived the state of all power in the premises. The court conceding that if

\*316

the act of Congress dealt with the subject the state statute would be inoperative, imposed the penalty on the ground that the act of 1910 did not extend to that field. The correctness of this conclusion is the one controversy with which the arguments are concerned.

[1] The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved power of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.

[2] As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act



to Regulate Commerce as well as placing them under the administrative control of the Interstate Commerce Commission so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly, an interstate telegram and that the court below erred therefore in imposing the penalty fixed by the state statute.

We do not pursue the subject further since the effect of the act of 1910 in taking possession of the field was recently determined in exact accordance with the conclusion we have just stated. *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. —. That case, indeed, was concerned only with the operation, after the passage of the act of 1910, of a state statute rendering illegal a clause of a contract for sending an interstate telegram limiting the amount of recovery under the conditions stated in case of an unrepeat-

\*317

message; but the \*ruling that the effect of the act of 1910 was to exclude the possibility thereafter of applying the state law was rested, not alone upon the special provisions of the act of 1910 relating to unrepeat messages, but upon the necessary effect of the general provisions of that act bringing telegraph companies under the control of the Interstate Commerce Act. The contention as to the continuance of state power here made is therefore adversely foreclosed. Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert state power after the passage of the act of 1910 were disapproved and various decisions of state courts of last resort to the contrary, one or more dealing with the subject now in hand, were approvingly cited.

Reversed and remanded for further proceedings not inconsistent with this opinion.

(251 U. S. 355)

EASTERN EXTENSION, AUSTRALASIA & CHINA TELEGRAPH CO., Limited,  
v. UNITED STATES.

(Argued Dec. 15, 1919. Decided Jan. 12, 1920.)

No. 357.

1. UNITED STATES ⇨69—NO IMPLIED OBLIGATION TO PAY SPANISH SUBSIDY TO PHILIPPINE CABLE COMPANY.

Where a cable company operated in the Philippine Islands under concession and subsidy from the Spanish government, and the United States government, when it assumed jurisdiction over the Islands, availed itself of the cables, paying rates demanded, while, after urging from the company, the Philippine gov-

ernment accepted taxes calculated by the company itself as due from it, and the company also prepared statement of account showing a false balance favorable to the United States, which balance was accepted by the treasurer of the Philippine government, organized pursuant to Act July 1, 1902, the United States was not under obligation to pay the Spanish subsidy to the company on any principle of undue enrichment, of implied obligation from acceptance of taxes, or from acceptance of balance of account.

2. COURTS ⇨449(1)—UNITED STATES ⇨69—CONTRACT LIABILITY ENFORCEABLE IN COURT OF CLAIMS CAN ONLY BE CREATED BY PROPER OFFICER.

A contract liability, express or implied, judicially enforceable by the Court of Claims against the United States, can be created only by some officer of the government lawfully invested with power to make such contracts, or to perform acts from which they may be lawfully implied.

Appeal from the Court of Claims.

Claim by the Eastern Extension, Australasia & China Telegraph Company, Limited, against the United States. From an adverse judgment, claimant appeals. Affirmed.

See, also, 231 U. S. 326, 34 Sup. Ct. 57, 58 L. Ed. 250.

\*356

\*Messrs. Louis Marshall and Samuel Untermyer, both of New York City, for appellant.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

The appellant, claimant, is the grantee from the government of Spain of three concessions to lay down and operate submarine cables. The first one, in 1879, was for the exclusive privilege, for 40 years, of constructing and operating a cable between the Island of Luzon and Hongkong. It was landed at Bolinao on the northerly coast of Luzon, and dispatches were transmitted to Manila and other places by government owned land lines, which were subject to interruption. This concession required that official messages be transmitted free and be given precedence. In 1898 a second concession, supplemental to the first, empowered the claimant to extend its cable to Manila, and the term of the prior exclusive grant was extended 20 years, with the same priority for official dispatches, but

\*357

with the provision that they were to be \*transmitted free only for the first 10 years from the date of this second grant.

In 1897 a third concession, the one with which this case is chiefly concerned, authorized the claimant to lay down and operate three submarine cables, connecting the Island of Luzon with three Visayas Islands—Panay, Negros, and Cebu. This grant re-

quired the claimant to operate the cables for 20 years; to give precedence to official dispatches and to charge for them at one-half the rates charged for private messages; to pay a tax of ten per cent. on receipts in excess of expenses not to exceed £6,000 per annum, an additional tax of "50 centimes of a franc" per word on telegrams transmitted, and a surtax of "5 centimes of a franc" per word on telegrams between the four islands named in the grant and others of the Archipelago.

The government of Spain, on its part, agreed to pay the claimant in equal monthly installments, an annual subsidy of £4,500 during the term of the grant.

All of the cables were promptly laid down and put in use, and those of the third grant are designated in the record as the "Visayas cables" and the grant as the "Visayas concession." This suit is to recover the amount of the subsidy provided for in the third concession, which had accrued when the petition was filed.

The United States denied all liability, and the judgment of the Court of Claims, dismissing the petition, is before us for review.

The case was here before on appeal, and this court held (231 U. S. 326, 34 Sup. Ct. 57, 58 L. Ed. 250) that the case as then stated in the petition was not within the jurisdiction of the court of Claims, whether viewed as asserting an obligation growing directly out of the treaty with Spain or one imposed by principles of international law upon the United States as a consequence of the cession of the Islands by the treaty. The court, however, referring to certain general and indefi-

\*358

nite \*allegations in the petition, suggested that the implication might be drawn from them that there may have been action on the part of officials of the government of the United States since it had assumed sovereignty over the Islands which, if properly pleaded and proved, would give rise to an implied contract with the claimant outside the treaty, which would be within jurisdiction of the Court of Claims, and, to the end that the right to have such a claim adjudicated might be saved, if it really existed, the case was remanded for further proceedings in conformity with the opinion.

Doubtless inspired by the suggestion from the court, an amended petition was filed, in which claimant alleged with much detail that the government of the United States had used the cables extensively for official messages, which had been given precedence and had been transmitted, as required by the terms of the two concessions, over the Hongkong cable free until 1908, and thereafter at one-fourth of the regular rate, and over the Visayas cables at one-half the rate charged for private dispatches; that the claimant had paid and the government accepted the 10 per cent. tax

on receipts from messages, computed as required by the third concession; that since the American occupation the service over the Visayas cables had been extended and improved at large expense by arrangement with duly authorized officers of the government; and that in August, 1905, the claimant had paid and the government had accepted a balance due on an account stated in a form indicating an adoption of the terms of the concessions. By this course of conduct, it was averred, the United States "assumed and adopted" all of the obligations imposed on the government of Spain by the concessions, and agreed with the claimant to discharge and perform all of them and especially agreed to pay the annual subsidy of £4,500, as required by article 10 of the third concession.

\*359

\*Trial by the Court of Claims resulted in findings of fact, as follows: That the concessions were made to claimant as alleged and that all of the cables were completed and in use when the Treaty with Spain was signed, December 10, 1898; that the government used the cables extensively for official dispatches, which were given priority in transmission, but that this was in accordance with the International Telegraph Convention, as well as in compliance with the terms of the concessions; that the claimant charged the government for messages over the Visayas cables at one-half the rate charged for private dispatches, which is the rate prescribed by the third concession, but that it "has paid the full rates charged by the claimant for messages over any of the lines" and claimant had authority to make its own rates; and that it is not true that the claimant transmitted messages over the Hongkong cable free of charge. "The United States government has paid full established rates on the Hongkong-Manila cable."

It is further found that since December, 1901, the claimant has made claim to the subsidy in annual statements to the authorities of the Philippine government, in which the terms of the concession granting it were referred to and in which the United States was charged with the amount of it then accrued. With respect to these, except as hereinafter noted, the court finds that whether any reply was made to them "does not appear from the record."

Much significance is attached by the claimant to the statement presented on June 11, 1905. The finding with respect to this is that on that date the claimant's representative forwarded to "the Secretary of Finance and Justice," an officer of the Philippine government at Manila, a communication, with an attached statement purporting to show the amount "due to the United States government in the

\*360

Philippines on account of the transmission \*of all United States government traffic over the Manila-Hongkong cable, as per the concession



granted to us for laying the same, up to and including December 31, 1904."

In this statement the government is credited (as if the amount had not been paid) with what it had paid for service over the Hongkong-Manila cable, laid under the first and second concessions, from August 21, 1898, to December 31, 1904, and it is charged with "Visayas subsidy," under the third concession, £4,500 per annum to December, 1904. Thus a balance was arrived at of £4,712.10.6 in favor of the United States, "as to the disposal of which I shall be glad to receive your instructions," wrote the representative of the claimant.

In reply to this the auditor of the government of the Philippine Islands, to whom it had been referred, wrote to claimant's representative at Manila, acknowledging receipt of his letter in which it was stated, "There is due the insular government under your concession the sum of £4,712.10.6," and the auditor added, "It is respectfully requested that said amount be deposited with the insular treasury as miscellaneous revenue." Payment was made and receipt given by the treasurer of the government of the Philippine Islands for the amount as "due government as per statement of account rendered by Eastern Extension, etc., Tel. Co. to Sec. Finance and Justice June 5, 1911."

Each year after 1905 the claimant sent a statement to the "Secretary of Finance and Justice" at Manila in the form following:

"The United States Government at Manila in Account with the Eastern Extension Australasia & China Tel. Co., Limited. \* \* \* Free Transmission of American Government Telegrams over Hongkong-Manila Section."

Then follow credits for messages passing over the Hongkong-Manila cable, as if they had not been paid for, and a debit of the "Vi-

\*361  
sayas \*subsidy" accrued to the date of the statement. To these no reply appears to have been made.

It is expressly found that:

"Except the payment above referred to in 1905, the claimant has never paid anything into the treasury of the Philippine government. It does not appear that any part of said sum was paid into the treasury of the United States. Nor has the claimant paid any sum to the United States government."

The only payment of the 10 per cent. tax under the third concession was that made in 1905, £184.17.2, and the statement showing this balance in favor of the United States concluded:

"I therefore have the honor to request that the necessary permission be given to the treasurer to receive these amounts, now standing to the credit of the United States government in the Philippines."

Of its own motion the claimant, in 1899, made extensions of the Visayas cables at a

considerable expense. But the finding with respect to this is:

"These extensions were carried out with the approval of the military authorities in control of the Philippines at the time, and by the sanction of the United States government, but without prejudice to, and with the reservation of, all rights of the government of the United States."

The following is from the court's finding of fact No. IX:

"Between the 10th day of December, 1898, and March, 1899, considerable correspondence was exchanged between the government of the United States and the claimant regarding the transmission of official telegrams over the Hongkong-Manila cable at reduced rates.

"On the 1st of March, 1899, the Secretary of War transmitted to the chairman of the claimant company a telegram, stating that the War Department 'accepts the courteous offer

\*362

of your company to transmit messages \*free between Hongkong and Manila, providing that this acceptance leaves in abeyance Spanish concession which is now under consideration.' On the following day claimant's reply was transmitted to the War Department, stating that the foregoing telegram had been received and the reservation therein noted, and that 'the company have pleasure in affording all possible facilities to the United States government in connection with the transmission of their telegrams.' On the 28th of March, 1899, a written communication was transmitted by the War Department to the duly authorized representative of the claimant company, to the effect that 'upon careful reconsideration of the subject it is deemed inadvisable for the department to avail itself of your company's offer. I beg to state, therefore, that the department will pay the established rates on official cable messages, and all accounts of this character presented to the United States will be paid.' This communication concluded with a renewal of thanks 'for the voluntary reduction in rates which your company has so courteously tendered.' The United States government has paid full established rates on Hongkong-Manila cable, and has paid the established rates on the Visayas cables on its messages."

Upon these findings of fact and upon principles and analogies derived from the law of private contract, the court must proceed to judgment. For it was determined by this court on the former appeal that any right in the defendant derived directly from the Treaty with Spain, or any obligation imposed upon the United States by principles of international law as a consequence of the cession of the Islands, would not be within the jurisdiction of the Court of Claims, and counsel for claimant, expressly disclaiming the assertion of any right under the Treaty of Paris, urge that the case be treated "exactly as it would be if it arose between two private citizens."

\*363

\*So regarding the case: It is obvious that no express contract by the United States to adopt and be bound by the third or any of



the concessions can be made out from the findings of fact, and it is equally clear that such an implied contract, using the words in any strict sense, cannot be derived from the findings, for it is plain that there is nothing in them tending to show that any official with power, express or implied, to commit that government to such a contract ever intended to so commit it.

The contention of the claimant must be sustained, if at all, as a quasi contract, as an obligation imposed by law independent of intention on the part of any officials to bind the government, one which in equity and good conscience the government should discharge because of the conduct of its representatives in dealing with the subject-matter.

[1] It is argued that the United States should be held to have assumed the burden of the concession because it derived benefits and advantages from the use of the cables.

These cables were in operation when the United States government assumed jurisdiction over the Islands. It extended a much more efficient governmental protection over the lines than they had before, but left the claimant in full ownership and control over them with the power to determine rates for service. The government, to be sure, availed itself of the advantages of communication which the cables afforded, but for such service it paid the rates which the claimant demanded and which it must be assumed were adequate. From such circumstances as these, very clearly, the law will not raise an obligation on the part of the government to assume the burden of the subsidy on the principle of undue enrichment or of advantage obtained. It used the cables as other customers used them, and from such a use, paid

\*364

\*for at the full rate demanded, no obligation can be derived by implication.

It is further contended that the terms and conditions of the concession should be imposed on the government because the officials of the Philippine government accepted taxes computed as provided for by the third grant.

The finding of the Court of Claims is not that the Philippine government demanded or exacted the small amount of taxes that was paid, but that the claimant itself computed the amount in the manner which it thought was provided for in the concession and tendered payment, which, after repeated urging, was accepted by local officers of the Philippine government so subordinate in character that it is impossible to consider them as empowered to commit the government of the United States to the large responsibilities now claimed to spring from their conduct.

The finding with respect to extension of the cables in 1899 excludes all suggestion of the assumption of any liability by the United States on account of the expenditure involved.

The form of the statement of account of

December 31, 1904, showing a balance favorable to the United States, which was paid to and accepted by the treasurer of the Philippine government, and from which so much is claimed, is not impressive as creating the asserted liability.

Here again the claimant, without suggestion of demand from the government of the United States or even from the Philippine government, prepared a statement, and, in order to give it the form of an account, was obliged to treat as unpaid charges for tolls over the Hongkong-Manila cable all of which had been paid by the United States government and accepted by the claimant.

A separate government, sustained by its own revenues, has been maintained for the Philippine Islands ever since they were ceded

\*365

to the United States. At first military, \*it became a civil government in 1902, organized as provided for by an act of Congress (32 Stat. p. 691, c. 1369), with a Governor General, and executive, legislative and judicial departments all subject to the supervision of the Secretary of War of the United States.

It is surprising that the claimant, when it desired to have these important concessions, with their large obligations, adopted by the government of the United States, did not make application for that purpose directly to that government or to its Secretary of War, or at least to the Governor General or legislative department of the Philippine government, instead of relying for its adoption by implication, as it has done, chiefly upon the form in which the accounts were presented to the secretary of finance and justice of the Philippine government.

The action of a department head of the Philippine government (inconsistent with the position taken by the Secretary of War in 1899, with respect to the subject-matter) in accepting a voluntary payment of \$23,000 cannot be made the sufficient basis for implying an obligation on the part of the government of the United States to pay a bonus of a total aggregate of almost \$440,000.

If doubt could be entertained as to the correctness of this conclusion, it would be disposed of by the fact that when the claimant, in March, 1899, tendered to the Secretary of War, so far as appears the only official of the United States with large powers, who considered the subject, the privilege of free transmission of messages over its Hongkong-Manila cable, as was provided for in the first concession, the offer was politely, but firmly, declined with the statement that "the Department will pay the established rates on official cable messages and all accounts of this character presented to the United States will be paid"—a promise which the findings show that he and his successors in office have faithfully kept.

[2] In the jurisdiction given to the Court

\*366

of Claims Congress has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. *Langford v. United States*, 101 U. S. 341, 345, 25 L. Ed. 1010; *United States v. Buffalo, Pitts Co.*, 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290; *Tempel v. United States*, 248 U. S. 121, 39 Sup. Ct. 56, 63 L. Ed. 162; *Ball Engineering Co. v. J. G. White*, 250 U. S. 55, 39 Sup. Ct. 393, 63 L. Ed. 835.

The foregoing discussion makes it palpably plain that no contract, express or implied, to pay the disputed subsidy, was made by any officer of the United States, and the judgment of the Court of Claims is therefore

Affirmed.

(251 U. S. 573)

CHIPMAN, Limited, v. THOMAS B. JEFFREY CO.

(Submitted Dec. 8, 1919. Decided Jan. 19, 1920.)

No. 516.

CORPORATIONS — 668(14) — JURISDICTION OF FOREIGN CORPORATION WHICH HAS LEFT STATE NOT OBTAINED, WHERE CAUSE OF ACTION AROSE OUT OF STATE, BY SERVICE ON INDIVIDUAL DESIGNATED THEREFOR.

Though a foreign corporation has engaged in business in New York, and as a condition of doing so has under the laws of that state designated an individual on whom process against it may be served in the state, a court in that state does not, in an action on a cause arising out of the state, obtain jurisdiction of its person by service of summons on such individual, after it has removed from the state; his unrevoked designation not giving it constructive presence in the state.

In Error to the District Court of the United States for the Southern District of New York.

Action by Chipman, Limited, against the Thomas B. Jeffrey Company. Complaint dismissed (260 Fed. 856), and plaintiff brings error. Affirmed.

Mr. Daniel P. Hays, of New York City, for plaintiff in error.

Messrs. Philip B. Adams, of New York City, and Thomas B. Kearney, for defendant in error.

\*376

\*Mr. Justice McKENNA delivered the opinion of the Court.

Plaintiff in error was plaintiff in the courts below, defendant in error was de-

fendant, and we shall refer to them respectively as plaintiff and defendant.

The action was brought in the Supreme Court of the state of New York, and removed upon motion of the defendant to the District Court of the United States for the Southern District of New York. In the latter court defendant made a motion for an order vacating and setting aside the service of summons, and dismissing the complaint, for lack of jurisdiction of the person of the defendant. The motion was granted, and the case is here on the jurisdictional question only.

A brief summary of the grounds of action and the proceedings upon the motion to dismiss is all that is necessary. Plaintiff is a New York corporation; defendant, one under the laws of Wisconsin, and a manufacturer and seller of motor cars, known as the "Jeffrey" and "Rambler," and parts thereof, and motor trucks and parts thereof. By contracts, in writing, made in Wisconsin by the plaintiff and defendant, it was agreed that the former should have the sole right

\*377

to sell the motor cars and parts thereof (first cause of action) and the motor trucks and parts thereof (second cause of action) of defendant in Europe and certain other foreign places, and to receive certain designated percentages. The contracts as to motor cars and their parts, and the trucks and their parts, provided that they (cars, trucks, and parts) should be sold and delivered to plaintiff (called in the contracts the "distributor") at Kenosha, Wis., for sale at the designated places by plaintiff; defendant reserving the right to fill the orders of plaintiff (distributor) for the cars, trucks, and parts from any of its defendant's depots in New York City. Cars and trucks purchased under the contracts to be paid for at Kenosha. Both contracts continued in effect to July 31, 1915.

There are allegations of performance of the contracts by plaintiff, their nonperformance by defendant, whereby plaintiff on one cause of action was entitled, it is alleged, to \$280,000, and upon the other \$600,000. Judgment is prayed for their sum, to wit, \$880,000.

The District Court has certified three questions, but, as the first includes the other two, we give it only as it sufficiently presents the question at issue:

"Whether in the service of summons, as shown by the record herein, upon Philip B. Adams, this court acquired jurisdiction of the person of the defendant."

Plaintiff contends for an affirmative answer, and adduces the New York statute, which requires of corporations not organized under the laws of New York, as a condition of doing business in the state, to file in



the office of the secretary of state a stipulation designating "a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state," and the person designated must consent, and the designation "shall continue in force until revoked by an instrument in writing" designating some other person.

\*378

\*Defendant complied with the requirements of the statute July 6, 1914, designating 21 Park Row, New York, as its place of business, and Philip B. Adams as its agent upon whom process might be served. The designation and appointment have not been revoked.

It is not denied, however, that defendant had removed from the state before service on Adams, and, as we have stated, the contracts sued on made the place of their performance Kenosha, Wis. But, in emphasis of the requirement of the statute, it is urged that, at all of the times of the duration of the contracts sued on and their breaches, defendant was doing business in the state, and at any time had the right to transact business in the state. It is further urged that the contracts contemplated they might be performed within the state. There is no allegation of such performance, nor that the present causes of action arose out of acts or transactions within the state. The other circumstances of emphasis may be disregarded, as the validity of the service depends upon the statute, assuming it to be controlling; that is, whether under its requirements the unrevoked designation of Adams as an agent of defendant gave the latter constructive presence in the state. And making that assumption of the control of the statute, which we do in deference to counsel's contention, for light we must turn to New York decisions, and there is scarcely ambiguity in them, though the facts in none of them included an actual absence from the state of the corporation with which they, the cases, were concerned.

Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389, passed upon the effect of a cause of action arising out of the state, the corporation, however, doing business within the state, and having complied with the statute in regard to its place of business and the designation of an agent upon whom process could be served. But the court throughout the opin-

\*379

ion, with conscious solicitude of the necessity of making the ground of its decision the fact that the corporation was doing business

in the state, dwelt upon the fact and distinguished thereby, *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345, and *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, in both of which the causes of action were based on transactions done outside of the states in which the suits were brought.

*Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, is nearer in principle of decision than the case just commented upon. The question of the doing of business within the state by the coal company was in the case and was discussed. But the question was unconnected with a statutory designation of a place of business or of an agent to receive service of process. However, there was an implication of agency in the coal company's sales agent under other provisions of the Code of Civil Procedure of the state and it was considered that the principle of *Bagdon v. Phila. & Read. C. & I. Co.*, supra, applied. But the court went further and left no doubt of the ground of its decision. It said:

"Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents" —citing and deferring to *St. Louis S. W. Ry. Co. of Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

And further said:

"The essential thing is that the corporation shall have come into the state."

If prior cases have a different bent, they must be considered as overruled, as was recognized in *Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 277, 115 N. E. 711.

In resting the case on New York decisions, we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southwestern Ry. Co. v. Alexander*, supra; *Philadelphia & Reading Ry. Co. v. McKibben*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Meisukas v. Greenough*

\*380

*Red Ash Coal Co.*, 244 U. S. 54, 37 Sup. Ct. 593, 61 L. Ed. 987; *People Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537.

It follows that the District Court did not have jurisdiction of defendant and its order and judgment dismissing the complaint is affirmed.



(251 U. S. 366)

**NAPA VALLEY ELECTRIC CO. v. BOARD  
OF RAILROAD COM'RS OF CALI-  
FORNIA et al.**

(Argued Dec. 12, 1919. Decided Jan. 19, 1920.)

No. 401.

1. **APPEAL AND ERROR** ⇨927(2)—THAT PETITION TO STATE SUPREME COURT AUTHORIZED DECISION ON THE MERITS PRESUMED TO SUSTAIN DISMISSAL IN FEDERAL COURT BECAUSE DENIAL OF PETITION WAS RES JUDICATA.

On appeal from decree of federal District Court dismissing bill on the ground that the controversy was res judicata by reason of denial of petition to state Supreme Court under Public Utilities Act Cal. § 67, for writ of review to the commission, it may be presumed that the petition, not in the record, circumstantially exhibited and submitted to the court the questions it was authorized to entertain, including a determination whether the commission's order violated any right under the federal Constitution.

2. **JUDGMENT** ⇨560 — DENIAL OF PETITION FOR WRIT OF REVIEW WITHOUT OPINION IS ADJUDICATION OF MERITS.

As the state Supreme Court, on petition under Public Utilities Act Cal. § 67, for writ of review to the commission, can, without having the record certified, decide the questions involved, they being shown on the face of the petition, its mere denial in such a case of the petition, without opinion, is an adjudication of such questions, thereafter assignable as res judicata.

Appeal from the District Court of the United States for the Northern District of California.

Suit by the Napa Valley Electric Company against the Board of Railroad Commissioners of California and others. Bill dismissed (257 Fed. 197), and plaintiff appeals. Affirmed.

\*367

\*Messrs. Milton T. U'Ren, of San Francisco, Cal., and D. L. Beard, of Napa, Cal., for appellant.

Mr. Douglas Brookman, of San Francisco, Cal., for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from decree of the District Court dismissing bill of appellant, herein called the Electric Company, upon motion of appellees, herein called the Commission.

The ground of the motion and the decree sustaining it was that it appeared from the averments of the bill that the controversy it stated was res judicata. The bill is long, but the grounds of it can be stated with fair brevity. The Electric Company is a California corporation and has been engaged for more than 10 years in supplying electricity (called in the bill electric energy) for domestic use in the town of St. Helena and vicinity,

and the Calistoga Electric Company, also a California corporation, has been for 7 years a distributing agency of the Electric Company and the latter is not as to the Calistoga Company a public utility. By virtue of certain circumstances the Electric Company entered into a contract with one E. L. Armstrong by which it agreed not to extend its lines into Calistoga territory, and Armstrong agreed to buy from it all of the electricity to be sold by him for 18 years. At that time the Electric

\*368

Company under the laws of California had a right to extend its lines and become a competitor of other companies or individuals.

September 14, 1911, the Calistoga Company became the successor in interest of Armstrong and to his rights and obligations under the contract with the Electric Company, and the Calistoga Company acknowledged the fact of such succession and continued to buy its electricity from the Electric Company at the rates set forth in the contract, until November 18, 1913, when it petitioned the Commission to set aside the contract and compel the Electric Company to accept other rates than those mentioned in the contract.

The Electric Company answered the petition, set up the contract and alleged that any change in its rates would be a violation of section 10, article 1, of the Constitution of the United States and the Fourteenth Amendment thereto.

January 24, 1914, the Commission instituted an investigation on its own motion which with the petition of the Calistoga Company was consolidated. The petitions were heard together upon evidence and submitted.

The Commission subsequently made an order fixing rates much less than those of the contract.

June 20, 1914, the Electric Company filed a petition for rehearing, setting up its rights under the Constitution of the United States. A rehearing was denied.

May 1, 1914, the Electric Company and the Calistoga Company entered into an agreement fixing rates subject to the approval of the Commission which the Calistoga Company agreed to secure. It did secure an informal approval of them and paid them until June 27, 1916.

The rates fixed by the Commission never became effective and therefore the Electric Company did not petition for a review of them by the Supreme Court of the state nor commence proceedings in any court of the United States to enjoin the order establishing them or to have it set aside as null and void.

\*369

\*June 27, 1916, the Calistoga Company again petitioned the Commission to establish other rates than those fixed in the agreement of that company with the Electric Company. The latter company filed a counter petition to have established the rates fixed in the con-

tract of May 1, 1914 (reduced to writing September 15, 1914), and the petition and that of the Calistoga Company came on to be heard and after evidence adduced the Commission, November 15, 1916, reduced the rates fixed in the written contract of September 15, 1914, and made the reduced rates effective December 20, 1916.

A rehearing was denied May 24, 1917, and on June 20, 1917, the Electric Company duly filed a petition in the Supreme Court of the state of California praying that a writ of review issue commanding the Commission on a day named to certify to the court a full and complete record of the proceedings before it, the Commission, and that upon a return of the writ the orders and decisions of the Commission be reversed, vacated and annulled upon the ground that they violated the company's rights under the Constitution of the United States, particularly under section 10, article 1, and under section 1 of article 14 of the Amendments thereto. The Supreme Court of California denied the "petition for writ of review and refused to issue a writ of review, as prayed for in said petition."

On or about January 27, 1918, the California Light & Telephone Company became a party to the contracts between the Electric Company and the Calistoga Company by reason of conveyances from the latter company.

In the present bill it is alleged that the orders and decisions of the Commission were illegal, were in excess of its jurisdiction and that the Electric Company has no adequate remedy at law and prays a decree declaring the orders and decisions null and void, that they be enjoined of enforcement or made the basis of suits against the company to enforce them.

**\*370**

\*The Commission and other defendants moved to dismiss on the ground that it appeared from the allegations of the bill that "the subject-matter thereof was *res judicata*" and that there was no ground stated entitling the company to the relief prayed. The motion was granted and to the decree adjudging a dismissal of the bill this writ of error is directed.

The District Court (Judge Van Fleet) based its ruling upon the allegations of the bill that the Electric Company filed in the Supreme Court a petition for a review of the decision and order of the Commission and for their annulment, and that the Supreme Court denied the petition.

The Electric Company to the ruling of the court opposes the contention that the Supreme Court denied the company's "petition for a preliminary writ and refused to even cause the record in the case, certified by the Commission to be brought up," and therefore "simply refused to entertain jurisdiction of the controversy." And it is the further contention that the court could neither affirm

nor set aside the orders of the Commission until the record was certified to it and the parties were before it and after formal hearing in the matter.

The contention is based on section 67 of the Public Utilities Act of the state. St. 1911 (Ex. Sess.) p. 18. The section is too long to quote. It is part of the procedure provided by the state for the execution of its policy in regard to the public utilities of the state, and affords a review of the action of the Commission regulating them. It is quite circumstantial and explicit. It provides for a review of the action of the Commission by writ of certiorari or review from the Supreme Court of the state which "shall direct the commission to certify its record in the case to the court," the cause to "be heard on the record of the commission as certified by it." No other evidence is to be received and the review is confined to an inquiry "whether the commission has regularly pursued its author-

**\*371**

ity" or "whether its order or decision "violates any right of the petitioner under the Constitution of the United States or of the state of California." The findings and conclusions of the Commission on questions of fact are to be final. The Commission and the parties have the right of appearance and upon the hearing the court "shall enter judgment either affirming or setting aside the order or decision of the commission." The Civil Code of the state is made applicable so far as it is not inconsistent with the prescribed proceedings and no court of the state except the Supreme Court to the extent specified shall have jurisdiction over any order or decision of the Commission except "that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

These provisions counsel insist were not observed and that therefore there was not and could not have been "an adjudication of the controversy" by the Supreme Court. There was nothing, it is insisted, but the Electric Company's petition before the court, and that none of the essential requirements of section 67 were observed. No writ of review was issued—none certified by the Commission or returned, no return day fixed or hearing had on a certified record, no appearance of the parties, no order of the court affirming or setting aside of the Commission's order. In other words the substance of the contention is that the court instead of hearing refused to hear, instead of adjudicating refused to adjudicate, and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of *res judicata* assigned to it by the District Court.

[1] Counsel to sustain the position that he has assumed and contends for insists upon a literal reading of the statute and a discussion of the elements of *res judicata*. We need not



follow counsel into the latter. They are

\*372

\*familiar and necessarily cannot be put out of mind, and the insistence upon the literalism of the statute meets in resistance the common and, at times, necessary practice, of courts to determine upon the face of a pleading what action should be taken upon it. The petition is not in the record. We may presume it was circumstantial in its exposition of the proceedings before the Commission and of the latter's decisions and orders, and exhibited and submitted to the court the questions it was authorized to entertain—whether the Commission "pursued its authority, including a determination of whether the order or decision" violated "any right" of the company "under the Constitution of the United States or of the state of California."

[2] Whether upon such an exhibition of the proceedings and questions the court was required to pursue the details of the section or decide upon the petition was a matter of the construction of the section and the procedure under it. And the Supreme Court has so decided. *L. Ghriest, Petitioner, v. R. R. Com'n*, 170 Cal. 63, 148 Pac. 195; *Mt. Konocti Light & Power Co. v. Max Thelen et al.*, 170 Cal. 468, 150 Pac. 359; *E. Clemens Horst Co. v. R. R. Commission*, 175 Cal. 660, 166 Pac. 804; *Hooper & Co. v. R. R. Comm.*, 175 Cal. 811, 165 Pac. 689. In those cases the applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California. And so with the denial of the petition of the Electric Company—it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of section 67, and they could be exercised upon the display in the petition of the proceedings before the Commission and of the grounds

\*373

upon which they were assailed. And \*we agree with the District Court that "the denial of the petition was necessarily a final judicial determination, \* \* \* based on the identical rights" asserted in that court and repeated here. *Williams v. Bruffy*, 102 U. S. 248, 255, 26 L. Ed. 135. And further, to quote the District Court:

"Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact. *Calaf v. Calaf*, 232 U. S. 371, 34 Sup. Ct. 411, 58 L. Ed. 642; *Hart Steel Co. et al. v. Railroad Supply Co.*, 244 U. S. 294, 299, 37 Sup. Ct. 506, 61 L. Ed. 1148."

The court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon

the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore the decree of the District Court is affirmed.

(251 U. S. 380)

# STROUD v. UNITED STATES.

(Petition for Rehearing Received Jan. 5, 1920.  
Decided Jan. 19, 1920.)

No. 276.

## 1. CRIMINAL LAW —1166½(8)—DENIAL OF CHALLENGE FOR CAUSE HARMLESS ERROR.

Where defendant, by the statute allowed 20 peremptory challenges, was in fact allowed 21, and it does not appear that any objectionable juror sat on the trial, his right to peremptory challenge was not abridged to his prejudice by an erroneous denial of a challenge for cause.

## 2. JURY —108—JUROR UNALTERABLY FOR CAPITAL PUNISHMENT SUBJECT TO CHALLENGE FOR CAUSE.

In a homicide case, where testimony of a juror made it reasonably certain that in the event of conviction for murder in the first degree he would render no other verdict than one which would require capital punishment, court should have granted a challenge for cause.

In Error to the District Court of the United States for the District of Kansas. Upon Petition for Rehearing.

Former opinion adhered to.

For former opinion, see 251 U. S. 15, 40 Sup. Ct. 50, 64 L. Ed. —.

Messrs. Isaac B. Kimbrell and Martin J. O'Donnell, both of Kansas City, Mo., for plaintiff in error on petition for rehearing.

Memorandum opinion by direction of the Court, by Mr. Justice DAY.

In this proceeding on November 24, 1919, this court affirmed the judgment of the United States District Court for the District of Kansas rendered upon a verdict convicting the plaintiff in error of murder in the first degree.

A petition for rehearing has been presented. It has been considered, and we find

\*381

occasion to notice only so \*much thereof as refers to the refusal of the court below to sustain the plaintiff in error's challenge for cause as to the juror Williamson. The other grounds urged have been examined and found to be without merit.

Williamson was called as a juror, and, as we said in our former opinion, was challenged for cause by the plaintiff in error. This challenge was overruled, and the juror was then challenged peremptorily by the accused. The testimony of Williamson made it reasonably certain that in the event of conviction for murder in the first degree he



would render no other verdict than one which required capital punishment. Granting that this challenge for cause should have been sustained, and that this ruling required the plaintiff in error to use one of his peremptory challenges to remove the juror from the panel, we held that the refusal to sustain the challenge was not prejudicial error, as the record disclosed that the defendant was allowed 22 peremptory challenges, when the law allowed but 20.

[1, 2] In the petition for rehearing it is alleged that the record discloses that in fact the accused was allowed 20 peremptory challenges and no more, and this allegation is accompanied by an affidavit of counsel giving the names of 20 persons challenged peremptorily by the plaintiff in error, and stating that no other peremptory challenges were allowed to him at the trial. In this statement the counsel is mistaken. An examination of the original transcript, as also the printed transcript, shows that a juror, H. A. Shearer, was called and examined upon his voir dire (printed transcript, page 79),

and later was peremptorily challenged by the plaintiff in error (printed transcript, page 143) and excused from the panel. H. A. Shearer's name does not appear upon the list of those as to whom peremptory challenges were made and sustained in plaintiff in error's behalf as given in the petition and affidavit for \*a rehearing.

<sup>\*382</sup> It does appear in the transcript that plaintiff in error was allowed 21 peremptory challenges, and it follows that his right to exercise such challenges was not abridged to his prejudice by the failure to allow the single challenge for cause which in our opinion should have been sustained by the trial judge. Furthermore, the record shows that after the ruling and challenge as to Williamson the plaintiff in error had other peremptory challenges which he might have used; and the record does not disclose that other than an impartial jury sat on the trial. See *Spies v. Illinois*, 123 U. S. 131, 168, 8 Sup. Ct. 22, 31 L. Ed. 80, and cases cited.

It follows that the petition for rehearing must be denied.

So ordered.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(251 U. S. 565)

No. 64. *GREAT NORTHERN RAILWAY COMPANY*, plaintiff in error, v. *The STATE OF WASHINGTON*. Jan. 5, 1920. In error to the Supreme Court of the State of Washington. For opinions below, see 97 Wash. 137, 165 Pac. 1073, 167 Pac. 1117. Messrs. E. C. Lindley, of St. Paul, Minn., F. V. Brown, of Seattle, Wash., and F. G. Dorety, of St. Paul, Minn., for plaintiff in error. Mr. W. V. Tanner, of Seattle, Wash., for State of Washington. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 80. *H. TURNER et al.*, executors, etc., plaintiffs in error, v. *J. P. WADE*, sheriff of Brooks County, Georgia. Jan. 5, 1920. See, also, 147 Ga. 666, 95 S. E. 220. Messrs. John D. Little, Arthur G. Powell, Marion Smith, and Max F. Goldstein, all of Atlanta, Ga., for plaintiffs in error. Mr. Clifford Walker, of Monroe, Ga., for defendant in error. Ordered that this case be restored to the docket for reargument.

(251 U. S. 565)

No. 148. *MAGMA COPPER COMPANY*, plaintiff in error, v. *Charles RISSALA*. Jan. 5, 1920. In error to the District Court of the United States for the District of Arizona. Messrs. Alex Britton and Evans Browne, both

of Washington, D. C., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(251 U. S. 541)

No. 251. *George J. TWOHY*, Executor, etc., plaintiff in error, v. *E. J. DORAN*, Commissioner of the Revenue, et al. Jan. 5, 1920. In error to the Supreme Court of Appeals of the State of Virginia. Mr. George Mason Dillard, of Norfolk, Va., for plaintiff in error. Mr. J. D. Hank, Jr., of Richmond, Va., for defendant in error.

*PER CURIAM*. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 556)

No. 604. *Carlos L. BYRON*, petitioner, v. *The UNITED STATES of America*. Jan. 5, 1920. For opinion below, see 259 Fed. 371. Messrs. P. V. Davis and Edward M. Comyns, both of Seattle, Wash., for petitioner. Mr. Frank K. Nebeker, Assist. Atty. Gen., and Mr. H. L. Underwood, Sp. Assist. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 549)

No. 625. Lillian B. PEMBLETON, petitioner, v. ILLINOIS COMMERCIAL MEN'S ASSOCIATION. Jan. 5, 1920. For opinion below, see Pembleton v. Illinois Commercial Men's Ass'n, 289 Ill. 99, 124 N. E. 355. Petition for a writ of certiorari to the Supreme Court of the State of Illinois granted.

(251 U. S. 556)

No. 626. The BALTIMORE DRY DOCK & SHIP BUILDING COMPANY, petitioner, v. NEW YORK & PORTO RICO STEAMSHIP COMPANY, owner and claimant of THE ISABELLA, et al. Jan. 5, 1920. For opinion below, see 262 Fed. 485. Mr. George Weems Williams, of Baltimore, Md., for petitioner. Messrs. George Forbes, of Baltimore, Md., and Ray Rood Allen, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(251 U. S. 565)

No. 130. William H. GARANFLO, petitioner, v. THE UNITED STATES of America; and

No. 131. Robert D. DUNCAN, petitioner, v. THE UNITED STATES of America. Jan. 9, 1920. On petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 246 Fed. 910, 159 C. C. A. 182. Mr. Chester H. Krum, of St. Louis, Mo., for petitioner. Mr. Assistant Attorney General Frierson, for the United States. Dismissed for want of prosecution on motion of Mr. Assistant Attorney General Frierson for the respondent.

No. —, original. Ex parte in the matter of Walter PETERSON, as receiver, etc., petitioner. Jan. 12, 1920. Motion for leave to file petition for writ of prohibition or mandamus granted, and a rule to show cause awarded returnable Monday, March 1, next.

(251 U. S. 566)

No. 135. Joseph GORDON, plaintiff in error, v. THE PEOPLE OF STATE OF ILLINOIS. Jan. 12, 1920. In error to the Supreme Court of the State of Illinois. For opinion below, see 283 Ill. 366, 119 N. E. 318. Mr. Louis Greenberg, of Chicago, Ill., for plaintiff in error. Dismissed with costs, pursuant to the tenth rule.

(251 U. S. 566)

No. 235. The UNITED STATES of America, as trustee, etc., plaintiff in error, v. SEUFERT BROTHERS COMPANY et al. Jan. 12, 1920. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 252 Fed. 51, 164 C. C. A. 163. Mr. Solicitor General King, for the United States. H. S. Wilson, of Portland, Or., for defendant in error. Dismissed on motion of Mr. Solicitor General King for the plaintiff in error.

(251 U. S. 541)

No. 239. W. W. HARRIS, plaintiff in error, v. THE STATE OF KANSAS. Jan. 12, 1920. In error to the Supreme Court of the State of

Kansas. For opinion below, see 103 Kan. 347, 175 Pac. 153. Mr. Joseph G. Waters, of Topeka, Kan., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 326, 334, 33 Sup. Ct. 510, 57 L. Ed. 857; St. Louis & San Francisco R. R. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(251 U. S. 541)

No. 591. Matty McLAUGHLIN, plaintiff in error, v. THE UNITED STATES of America. Jan. 12, 1920. In error to the District Court of the United States for the Northern District of Ohio. Messrs. Daniel L. Cruice, of Chicago, Ill., and Rob. V. Phillips, of Toledo, Ohio, for plaintiff in error. Mr. Alex. C. King, Solicitor General, of Atlanta, Ga., and A. F. Myers, of Washington, D. C., for the United States. Messrs. Thos. H. Tracy and George D. Welles, both of Toledo, Ohio, for Dail Overland Co. Amici Curiae.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Toledo Newspaper Co. v. United States, 247 U. S. 402, 410-411, 38 Sup. Ct. 560, 62 L. Ed. 1186; Besette v. W. B. Conkey Co., 194 U. S. 324, 328-337, 24 Sup. Ct. 665, 48 L. Ed. 997; O'Neal v. United States, 190 U. S. 36, 37-38, 23 Sup. Ct. 776, 47 L. Ed. 945; (2) Carey v. Houston & Texas Central Ry. Co., 150 U. S. 171, 14 Sup. Ct. 63, 37 L. Ed. 1041; Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353, 38 L. Ed. 179; Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; (3) In re Lennon, 150 U. S. 393, 399-401, 14 Sup. Ct. 123, 37 L. Ed. 1120; (4) Itow et al. v. United States, 233 U. S. 581, 34 Sup. Ct. 699, 58 L. Ed. 1102; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(251 U. S. 556)

No. 608. HURNI PACKING COMPANY, petitioner, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. Jan. 12, 1920. For opinion below, see 260 Fed. 641. Mr. Deloss C. Shull, of Sioux City, Iowa (Messrs. Charles M. Stilwill and Edwin J. Stason, both of Sioux City, Iowa, of counsel), for petitioner. Messrs. Frederick L. Allen, of New York City, and Frederic D. McKenney, of Washington, D. C. (Messrs. Ralph L. Read, of Des Moines, Iowa, and Guy T. Struble, of Sioux City, Iowa, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(251 U. S. 556)

No. 619. The NORMA MINING COMPANY, petitioner, v. Hugh MACKAY. Jan. 12, 1920. For opinion below, see 258 Fed. 914, 991. Messrs. George Lull and Maurice T. Dooling, Jr., both of San Francisco, Cal., for petitioner. Messrs. Frederick A. Williams, of Boston, Mass., and Robinson & Robinson, of Denver, Colo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 556)

No. 623. *Wade C. KILMER, trustee, etc., petitioner, v. The FIRST SAVINGS & BANKING COMPANY.* Jan. 12, 1920. For opinion below, see 263 Fed. 497. Messrs. Conrad H. Syme and F. H. Stephens, both of Washington, D. C., and Stuart W. Walker, of Martinsburg, W. Va., for petitioner. Messrs. Clarence E. Martin, and C. M. Seibert, both of Martinsburg, W. Va., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(251 U. S. 557)

No. 629. *VIRGINIA-WESTERN POWER COMPANY, petitioner, v. The COMMONWEALTH OF VIRGINIA at the relation of the CITY OF CLIFTON FORGE;*

No. 630. *VIRGINIA-WESTERN POWER COMPANY, petitioner, v. The COMMONWEALTH OF VIRGINIA at the relation of the CITY OF BUENA VISTA;*

No. 631. *VIRGINIA-WESTERN POWER COMPANY, petitioner, v. The COMMONWEALTH OF VIRGINIA at the relation of the TOWN OF COVINGTON; and*

No. 632. *VIRGINIA-WESTERN POWER COMPANY, petitioner, v. The COMMONWEALTH OF VIRGINIA at the relation of the TOWN OF LEXINGTON.* Jan. 12, 1920. For opinion below, see 99 S. E. 723. Messrs. F. W. King, of Clifton Forge, Va., and J. M. Perry, of Staunton, Va., for petitioner. Messrs. O. C. Jackson, and Frank Moore, both of Lexington, Va. (Mr. Wm. A. Anderson, of Lexington, Va., of counsel), for respondent. Petition for writs of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(251 U. S. 557)

No. 635. *ERIE RAILROAD COMPANY, petitioner, v. James B. CONNORS.* Jan. 12, 1920. For opinion below, see 261 Fed. 303. Messrs. C. D. Hine and Paul J. Jones, both of Youngstown, Ohio, for petitioner. Mr. W. J. Kenealy, of Youngstown, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(251 U. S. 557)

No. 637. *EDWARD HINES LUMBER COMPANY, petitioner, v. AMERICAN CAR & FOUNDRY COMPANY.* Jan. 12, 1920. For opinion below, see 262 Fed. 757. Messrs. Jacob Newman, Conrad H. Poppenhusen, Henry L. Stern, Edward R. Johnston and Charles T. Farson, all of Chicago, Ill., for petitioners. Messrs. Charles J. Hardy, of New York City, Kemper K. Knapp, Robert W. Campbell, and William D. McKenzie, all of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(251 U. S. 558)

No. 639. *Emil HERMAN, petitioner, v. The UNITED STATES of America.* Jan. 12, 1920. For opinion below, see 257 Fed. 601. Messrs. Austin Lewis, of San Francisco, Cal., and C. E. S. Wood, of Portland, Or., for petitioner. Mr. Robert P. Stewart, Asslt. Atty. Gen., and Harry S. Ridgely, of Cheyenne, Wyo., for

the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 558)

Nos. 641 and 642. *CONSOLIDATED WINDOW GLASS COMPANY, petitioner, v. WINDOW GLASS MACHINE COMPANY et al.;*

Nos. 643 and 644. *PENNSYLVANIA WINDOW GLASS COMPANY, petitioner, v. WINDOW GLASS MACHINE COMPANY et al.;* and

Nos. 645 and 646. *KANE GLASS COMPANY, petitioner, v. WINDOW GLASS MACHINE COMPANY et al.* Jan. 12, 1920. For opinion below, see 261 Fed. 362. Messrs. Marshall A. Christy, of Pittsburgh, Pa., Charles Neave, of Boston, Mass., and Albert W. Bright, of Washington, D. C., for petitioners. Messrs. George H. Parmelee, and Clarence P. Byrnes, both of Pittsburgh, Pa., and Livingston Gifford, of New York City, for respondents. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(251 U. S. 558)

No. 648. *ARCTIC IRON COMPANY, petitioner, v. CLEVELAND-CLIFFS IRON COMPANY et al.* Jan. 12, 1920. For opinion below, see 261 Fed. 15. Mr. Otto C. Sommerich, of New York City (Messrs. Alexis C. Angell, of Detroit, Mich., Edwin M. Borchard, of New Haven, Conn., and Otto C. Sommerich, of New York City, of counsel), for petitioner. Messrs. A. C. Dustin, Horace Andrews and W. P. Belden, all of Cleveland, Ohio, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 220. *The UNITED STATES, appellant, v. George F. ARCHER et al.* Jan. 13, 1920. See, also, *Archer v. Archer*, 53 Ct. Cl. 405. The Attorney General, for the United States. T. M. Miller, of New Orleans, La., for respondent. Death of George F. Archer suggested, and appearance of Kate C. Archer, as administratrix of the estate of George F. Archer, deceased, as a party, filed and entered, on motion of Mr. T. M. Miller for Archer.

No. —, original. *The STATE OF RHODE ISLAND, complainant, v. A. Mitchell PALMER, Attorney General of the United States et al.* Jan. 19, 1920. Motion for leave to file bill of complaint herein granted.

(251 U. S. 543)

No. —, original. *Ex parte in the matter of James F. BISHOP, administrator, etc., petitioner.* Jan. 19, 1920. Motion for leave to file petition for a writ of prohibition or mandamus herein denied.

(251 U. S. 542)

No. 136. *E. GOUGE et al., appellants, v. John M. HART, collector of internal revenue et al.* Jan. 19, 1920. Appeal from the District Court of the United States for the Western District of Virginia. For opinion below, see 250



Fed. 802. Mr. C. J. St. John, of Bristol, Tenn., for appellants.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Courtney v. Pradt*, 196 U. S. 89, 91, 25 Sup. Ct. 208, 49 L. Ed. 398; *Farrugia v. Philadelphia & Reading Ry. Co.*, 233 U. S. 352, 353, 34 Sup. Ct. 591, 58 L. Ed. 996; *Louisville & Nashville Ry. Co. v. Western Union Tel. Co.*, 234 U. S. 369, 371-372, 34 Sup. Ct. 810, 58 L. Ed. 1356; *Male v. Atchison, Topeka & Santa Fe Ry. Co.*, 240 U. S. 97, 99, 36 Sup. Ct. 351, 60 L. Ed. 544.

(251 U. S. 559)

No. 600. *W. F. HALLOWELL*, petitioner, v. *The UNITED STATES of America*. Jan. 19, 1920. For opinions below, see 253 Fed. 865, 165 C. C. A. 345; 258 Fed. 237. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 549)

No. 634. *YEE WON*, petitioner, v. *Edward WHITE*, as Commissioner of Immigration, port of San Francisco. Jan. 19, 1920. For opinion below, see 258 Fed. 792. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(251 U. S. 559)

No. 660. *The AMERICAN GUARANTY COMPANY*, petitioner, v. *AMERICAN FIDELITY COMPANY*. Jan. 19, 1920. For opinion below, see 260 Fed. 897. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(251 U. S. 559)

No. 663. *MORRIS & CUMINGS DREDGING COMPANY*, petitioner, v. *CORNEILL STEAMBOAT COMPANY*. Jan. 19, 1920. For opinion below, see 261 Fed. 897. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(251 U. S. 559)

No. 664. *JEONG QUEY HOW*, petitioner, v. *Edward WHITE*, as Commissioner of Immigration at the port of San Francisco. Jan. 19, 1920. For opinion below, see 258 Fed. 618, 170 C. C. A. 72. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 543)

No. —. *Harmon P. McKNIGHT v. The UNITED STATES*. Jan. 20, 1920. Application for leave to proceed in forma pauperis for the purposes of a petition for certiorari to and an appeal from the District Court of the United States for the District of Massachusetts.

PER CURIAM. The prayer to be allowed to proceed in forma pauperis for the purpose of an application for certiorari to review the judgment below, as well as for the purpose of an appeal asked to review a refusal to release on habeas corpus, made to the Chief Justice and by him submitted to the court for its action is hereby denied.

(251 U. S. 566)

No. 174. *SEABOARD AIR LINE RAILWAY COMPANY*, petitioner, v. *Mrs. Lessie HORTON*, administratrix, etc. Jan. 21, 1920. On writ of certiorari to the Supreme Court of the State of North Carolina. For opinion below, see 175 N. C. 472, 95 S. E. 883. See, also, 248 U. S. 553, 39 Sup. Ct. 8, 63 L. Ed. 418; 39 Sup. Ct. 21, 64 L. Ed. —. Mr. Thaddeus A. Adams, of Charlotte, N. C., for petitioner. Mr. Robert W. Winston, of Raleigh, N. C., for respondent. Dismissed with costs, on motion of counsel for the petitioner.

(251 U. S. 382)

## REX v. UNITED STATES et al.

(Argued Jan. 13, 1920. Decided Jan. 26, 1920.)

No. 126.

COURTS  456 — STATUTE REINSTATES ONLY THOSE CLAIMS FOR INDIAN DEPREDACTIONS DISMISSED FOR ALIENAGE OF CLAIMANT.

The amendment of Act March 3, 1891, § 1, giving jurisdiction to Court of Claims over claims for property of "citizens" taken by Indians of a "band, tribe or nation" in amity with the United States, by Act Jan. 11, 1915, so that, in claims for property of "citizens or inhabitants" taken by Indians belonging to any "tribe" in amity with the United States, the alienage of the claimant shall not be a defense, and reinstating claims that had been dismissed for want of proof of citizenship, or for alienage, of claimant, does not, as is necessary to prevent the claim being barred by limitations, reinstate a claim dismissed because the Blackhawk "band" of Utes, taking the property, was not in amity with the United States.

Appeal from the Court of Claims.

Suit by Mary E. Rex, administratrix of James A. Ivie, deceased, against the United States and the Ute Indians. Petition dismissed (53 Ct. Cl. 320), and claimant appeals. Affirmed.

\*383

\*Mr. Harry Peyton, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Davis, for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition upon demurrer. The claim is for depredations committed on June 10, 1866, by a band of the Ute tribe of Indians, known as Blackhawk's band. The Act of March 3, 1891, c. 538, § 1, 26 Stat. 851, gave jurisdiction to the Court of Claims over all claims for property of citizens taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States. See Rev. Stat. § 2156 (Comp. St. § 4159). Act of June 30, 1834, c. 161, § 17, 4 Stat. 729, 731. The appellant's intestate filed his claim but on June 13, 1898, the Court of Claims held that the Blackhawk band of Utes was not in amity with the United States and dismissed the petition. The present petition relies upon the Act of January 11, 1915, c. 7, 38 Stat. 791, amending the first section of the Act of 1891

so that in all claims for property of citizens or inhabitants of the United States taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States, &c., the alienage of the claimant shall not be a defence to said claims, with provisos to be mentioned. The present petition, filed September 21, 1917, alleges that the tribe of Utes was in amity with the United States.

The claimant contends that the amendment had two purposes—not merely to give inhabitants the same rights as citizens, but also to admit claims for damage done by hostile bands from a tribe that maintained its amity, subject to a proviso that suit had been

\*384

brought upon them \*theretofore in the Court of Claims. It is said that claims of that nature that still were pending in the Court have been awarded judgment under the new jurisdiction. Another proviso in the Act is that claims that have been dismissed by the Court for want of proof of citizenship or alienage shall be reinstated, and the petition prays that the former claim be consolidated with this suit, and that judgment be awarded upon the evidence filed in the former case. It is pointed out as an anomaly that the case of a neighbor of the intestate who suffered damage from the same band on the same day was reinstated and passed to judgment, his claim having been dismissed at an earlier date because he was not a citizen at the time.

But we are of opinion that the judgment of the Court of Claims was plainly right. The emphasis and primary intent, at least, of the Act of 1915 was to remove the defence of alienage. When it goes on by an express proviso to reinstate claims dismissed upon that ground and says nothing as to the other class it is impossible to extend the words. According to the claimant's necessary argument Congress had claims for damage by hostile bands before its eyes. On the face of the act it had before them also the matter of reinstatement. Yet it did not purport to reinstate claims of the present class. According to the claimant's account there was something for the act to operate on in the way of damage by hostile bands and the words cannot be carried further than they go. The Court of Claims rightly held that the old claim was not reinstated and that considered as a new claim the present suit was barred by the three years' limitation in the original act.

Judgment affirmed.

(251 U. S. 385)

SILVERTHORNE LUMBER CO., Inc., et al.  
v. UNITED STATES.

(Argued Dec. 12, 1919. Decided Jan. 26, 1920.)

No. 358.

1. SEARCHES AND SEIZURES  7—KNOWLEDGE  
GAINED BY GOVERNMENT'S WRONG MAY NOT  
BE USED.

Knowledge gained by government's wrongful search and seizure may not, on return by order of the court, of the original articles, be used to call on the owners by subpoenas to produce them; so that they may not be punished for disobeying an order to comply with the subpoenas.

2. SEARCHES AND SEIZURES  7—CORPORATION  
TO BE PROTECTED.

The rights of a corporation against unlawful search and seizure are to be protected, even if the same result might be achieved by the government in a lawful way.

The Chief Justice and Mr. Justice Pitney, dissenting.

In Error to the District Court of the United States for the Western District of New York.

Judgment for contempt was rendered against the Silverthorne Lumber Company, Incorporated, and another for disobedience of an order to comply with subpoenas to produce papers in a prosecution by the United States, and they bring error. Reversed.

Messrs. Frederic D. McKenney and Myer Cohen, both of Washington, D. C., and William D. Guthrie, of New York City, for plaintiffs in error.

Mr. Assistant Attorney General Stewart, for the United States.

\*390

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a writ of error brought to reverse a judgment of the District Court fining the Silverthorne Lumber Company two hundred and fifty dollars for contempt of court and ordering Frederick W. Silverthorne to be imprisoned until he should purge himself of a similar contempt. The contempt in question was a refusal to obey subpoenas and an order of Court to produce books and documents of the company before the grand jury to be used in regard to alleged violation of the statutes of the United States by the said Silverthorne and his father. One ground of the refusal was that the order of the Court infringed the rights of the parties under the Fourth Amendment of the Constitution of the United States.

The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes men-

tioned, they both were arrested at their homes early in the morning of February 25, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employes were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once. An application was made as soon as might be to

\*391

the District Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpoena for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpoenas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

[1, 2] The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, to be sure, had established that laying the papers directly

\*392

before the grand jury was \*unwarranted, but



it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. The numerous decisions, like *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in *Weeks v. United States*, 232 U. S. 383, 394, 395, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in *Flagg v. United States*, 233 Fed. 481, 483, 147 C. C. A. 367. In *Linn v. United States*, 251 Fed. 476, 480, 163 C. C. A. 470, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

Judgment reversed.

The CHIEF JUSTICE and Mr. Justice PITNEY dissent.

(251 U. S. 396)

# BROOKS-SCANLON CO. v. RAILROAD COMMISSION OF LOUISIANA.

(Argued Jan. 6, 1920. Decided Feb. 2, 1920.)

No. 386.

## 1. RAILROADS ⇨57 — OPERATION AT LOSS CANNOT BE REQUIRED.

A company cannot be compelled to operate its railroad where it cannot do so without loss therefrom, though its other business of lumbering be sufficiently remunerative to absorb the loss and make returns on its entire business.

## 2. RAILROADS ⇨57—MAY DISCONTINUE OPERATION AT LOSS.

If a company operating a lumber business and a railroad be taken to have granted to the

public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

## 3. COURTS ⇨107—RECITAL OF OPINION NOT A FINDING OF FACT.

Recital of opinion after sustaining order of Railroad Commission requiring plaintiff to operate its railroad, on the ground that plaintiff's other business of lumbering was successful enough to stand a loss on the road, that the commission's order calls on plaintiff "to submit a new schedule for transportation which may be operated \* \* \* at a profit for plaintiff," cannot be considered as a finding that such a schedule can be submitted; there being no evidence warranting such a finding.

## 4. CONSTITUTIONAL LAW ⇨297—STATE CANNOT AUTHORIZE CONSTITUTIONALLY RAILROAD OPERATION AT LOSS.

Whatever may be the forms required by local law of a company desiring to discontinue its railroad business, it cannot authorize the Railroad Commission or the court to do what the federal Constitution forbids, which is the effect of an order of the one and an injunction of the other compelling it to operate, though at a loss.

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

Suit by the Brooks-Scanlon Company against the Railroad Commission of Louisiana. Judgments adverse to defendant were reversed by the Supreme Court of Louisiana (144 La. 1086, 81 South. 727), and plaintiff brings certiorari. Reversed.

Messrs. J. Blanc Monroe, of New Orleans, La., Robert R. Reid, of Hammond, La., and Monte M. Lemann, of New Orleans, La., for petitioner.

Mr. Wylle M. Barrow, of Baton Rouge, La., for respondent.

\*397

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the Brooks-Scanlon Company, a Minnesota corporation organized to manufacture and deal in lumber and to carry on other incidental business, against the Railroad Commission of Louisiana. It seeks to set aside an order (Number 2228) of the Commission requiring the plaintiff either directly or through arrangements made with the Kentwood and Eastern Railway Company, to operate its narrow gauge railroad between Kentwood and Hackley in Louisiana upon schedules and days to be approved by the Commission. The plaintiff alleges that the order cannot be complied with except at a loss of more than \$1,500 a month, and that to compel compliance would deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, with

other objections not necessary to be mentioned here. The defendant denies the plaintiff's allegations and in reconvention prays for an injunction against the tearing up or abandoning of the road and for a mandate upholding the order. In the Court of first instance a preliminary injunction was issued in favor of the Commission, but was dissolved upon bond. Subsequently a judgment was entered denying a motion of the Commission to set aside the order dissolving the injunction, and after a trial on the merits judgment was entered for the plaintiff, declaring the order void. The defendant appealed from both judgments to the Supreme Court of the State. That Court reversed the decision below and reinstated the injunction granted on the defendant's prayer.

\*398

\*It seems that the Banner Lumber Company, a Louisiana corporation, formerly owned timber lands, sawmills and this narrow gauge railroad. The road was primarily a logging road but it may be assumed to have done business for third persons as a common carrier. The Banner Lumber Company sold the whole property to the Brooks-Scanlon Lumber Company on November 1, 1905, the stockholders of which obtained a charter for the railroad as the Kentwood and Eastern Railway Company on December 5 of the same year. In the interim it was managed by them with separate accounts. An oral lease of the road was made to the new company and soon afterwards the Brooks-Scanlon Lumber Company transferred its property to the Brooks-Scanlon Company, the plaintiff in error. On the first of July, 1906, the Brooks-Scanlon Company made a written lease of the road to the Railway Company and sold to it all the rolling stock and personal property used in connection with the road. Thereafter the road was run as before, doing a small business as a common carrier but depending upon the carrying of logs and lumber to make it a profitable rather than a losing concern. In course of time the timber of the Brooks-Scanlon Company was cut and it terminated the lease to the Railway Company, which discontinued business on April 22, 1918, with the assent of the Railroad Commission, and sold its rolling stock. At that time the Commission being advised that it had no power did nothing more. But later, subsequent to a decision by the Supreme Court in May, it issued notice to the Brooks-Scanlon Company and the Railway to show cause why the road should not be operated, gave a hearing, and issued the order complained of here. The Supreme Court, after saying that the two corporations were one under different names stated that the only question left for determination was whether the plaintiff could be compelled by

\*399

the Commission to operate \*its railroad, and concluded that although the railroad showed a loss, the test of the plaintiff's rights was the net result of the whole enterprise—the

entire business of the corporation—and on that ground made its decree.

[1, 2] We are of opinion that the test applied was wrong under the decisions of this Court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595, 599, 600, 604, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, and *Norfolk & Western Ry. Co. v. West Virginia*, 236 U. S. 605, 609, 614, 35 Sup. Ct. 437, 59 L. Ed. 745. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 276, 278, 30 Sup. Ct. 330, 54 L. Ed. 472. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

[3] While the decision below goes upon the ground that we have stated, it is thrown in at the end as a makeweight that the order of the Commission calls upon the plaintiff "to submit a new schedule for transportation which may be operated at much less expense

\*400

to it than \*the former schedule cost, and at a profit for plaintiff." This is merely the language of hope. We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding. The assumption upon which the Court made its ruling was that the plaintiff's other business was successful enough to stand a loss on the road.

[4] Finally a suggestion is made in argument that the decision rested also upon another ground that cannot be reconsidered here. At the end of the opinion it is stated that the plaintiff has not petitioned the Railroad Commission for leave to discontinue this business and that until it has done so the courts are without jurisdiction of the matter. It is not impossible that this is an oversight since it seems unlikely that after the Commission has called the plaintiff before it on the question and against its strenuous objection has required it to go on, such an empty.



form can be required. But in any case it cannot be meant that the previous discussion which occupies the whole body of the opinion is superfluous and irrelevant to the result reached; nor can the words be taken literally, since the court proceeded to take jurisdiction and reinstated an injunction in favor of the defendant. Whatever may be the forms required by the local law it cannot give the Court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. *Pennsylvania R. R. Co. v. Public Service Commission of Pennsylvania* (November 10, 1919), 250 U. S. 566, 40 Sup. Ct. 36, 63 L. Ed. 1142.

Decree reversed.

(251 U. S. 393)

### HENRY v. UNITED STATES.

(Argued Jan. 21, 1920. Decided Feb. 2, 1920.)

No. 162.

**INTERNAL REVENUE** ⇨ 36—**INTERESTS OF LEGATEES BECAME VESTED IN POSSESSION, SO THAT LEGACY TAXES WERE NOT REFUNDABLE, WHERE MONEYS WERE PAID LEGATEES OR TRANSFERRED TO TRUSTEE BEFORE JULY 1, 1902.**

Within Act June 27, 1902, § 3, providing for refunding of legacy tax under Spanish War Revenue Act, collected on contingent beneficial interests not vesting before July 1, 1902, the amount of a legacy in trust for life of beneficiary having been transferred by the executor to his separate account as trustee, and moneys having been paid over by the executor to the residuary legatees, all before said July 1st, the interests of the beneficiary and legatees in such funds became then vested in possession, and the funds taxable, though the time for proving claims against the estate did not expire till after such date, with the consequent possibility of such payments having to be refunded to pay debts of the estate, and though the life tenant received no income before such date.

#### Appeal from the Court of Claims.

Claim by Charles I. Henry, executor of Arthur T. Hendricks, deceased, against the United States. Judgment for the United States (53 Ct. Cl. 641), and claimant appeals. **Affirmed.**

Messrs. Simon Lyon and R. B. H. Lyon, both of Washington, D. C., for appellant.

Mr. Solicitor General Alex. C. King, of Atlanta, Ga., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover taxes paid under the Spanish War Revenue Act of June 13,

1898, c. 448, §§ 29, 30, 30 Stat. 448, 464, 465, repealed by the Act of April 12, 1902, c. 500, § 7, 32 Stat. 96, 97, the repeal to take effect on July 1, 1902. By the Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, the Secretary of the Treasury was directed to refund taxes upon legacies collected upon contingent beneficial interests that should not have become vested before July 1, 1902, and this claim is made under the last mentioned act. The claim

\*394

was held by the Court of \*Claims to be barred by the Statute of Limitations. In view of the decision in *Sage v. United States*, 256 U. S. 33, 39 Sup. Ct. 415, 63 L. Ed. 828, it is admitted by the Government that the judgment cannot be sustained on that ground, and therefore that matter need not be discussed, but it is contended that the judgment was right because the legacies taxed had become vested before July 1, 1902. Whether they had become vested within the meaning of the refunding act is the only question in the case.

The facts are these: Arthur Hendricks died domiciled in New York on March 5, 1902, and his will was proved on March 17, 1902. The claimant was executor and trustee under the will. By that instrument the sum of \$50,000 was left to the claimant in trust for Florence Lester for life, the remainder to go to the residue. The residue was left to the testator's five sisters. On July 1, 1902, the time for proving claims against the estate had not expired, but before that date the executor, having correctly estimated that a large sum would be left after all debts, paid over \$135,780 to the five sisters in equal shares and 'established the trust fund' for Florence Lester, that is, as we understand the finding, transferred the sum of \$50,000 to his separate account as trustee. The taxes in question were levied on these two amounts.

There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. *United States v. Jones*, 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316; *McCoach v. Pratt*, 236 U. S. 562, 35 Sup. Ct. 421, 59 L. Ed. 720. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right. We will assume that, if the estate had proved insufficient, the executor not only would have been responsible but could have recovered such portion of his payments as was needed to pay

\*395

debts. \*Still the consequence asserted does not follow. There can be no question that the interest of the sisters was held in possession, and so was that of the trustee, although he happened to be the same person



as the executor. The interest was vested also in each case. The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and a vested interest subject to be divested is familiar to the law. Gray, Rule Against Perpetuities, § 108. The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value as fixed by the mortuary tables. *United States v. Fidelity Trust*

Co., 222 U. S. 158, 160, 32 Sup. Ct. 59, 56 L. Ed. 137. In that case it was contended that the life estate was contingent so far as not actually enjoyed.

It is argued with regard to the trust for Florence Lester that the case stands differently because the life tenant received no income from it before July 1, 1902. But for the purposes of this act the interest in a fund transferred from an estate to a trustee for ascertained persons is vested in possession no less than when it is conveyed directly to them. See *United States v. Fidelity Trust Co.*, *supra*.

Judgment affirmed.

(252 U. S. 178)

UNITED STATES ex rel. KANSAS CITY  
SOUTHERN RY. CO. v. INTERSTATE  
COMMERCE COMMISSION.

{Argued Dec. 10, 1919. Decided March 8, 1920.}

No. 413.

1. COMMERCE 85—REFUSAL OF INTERSTATE  
COMMERCE COMMISSION TO FOLLOW STATUTE  
IN VALUING PROPERTY OF COMMON CARRIERS  
NOT JUSTIFIED BY SUPREME COURT DECISION.

As Congress had authority to require the Interstate Commerce Commission, in ascertaining the value of the property of common carriers, under Act March 1, 1913, c. 92, § 19a, amending Act Feb. 4, 1887, c. 104 (Comp. St. § 8591) to ascertain the present cost of condemnation and damages, or of purchase in excess of the original cost or present value, it is its duty to do so, even assuming that the Supreme Court decided in a railroad rate case that such matters were beyond the possibility of rational determination.

2. COMMERCE 87—DIFFICULTY OF INTER-  
STATE COMMERCE COMMISSION OBEYING  
STATUTE IN VALUING RAILROAD PROPERTY  
DOES NOT EXCUSE FAILURE OR REFUSAL.

That the ascertainment by the Interstate Commerce Commission of the present cost of condemnation and damages, or of purchase of the property of common carriers, in excess of the original cost or present value, as required by Act March 1, 1913, c. 92, § 19a, amending Act Feb. 4, 1887, c. 104 (Comp. St. § 8591), will necessarily open a wide range of proof, and call for the exercise of close scrutiny and scrupulous analysis in its consideration and application, affords no basis for the refusal of the commission to hear evidence and ascertain such present cost.

In Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on the relation of the Kansas City Southern Railway Company, against the Interstate Commerce Commission. A judgment for defendant was affirmed by the Court of Appeals by a divided court, and the relator brings error. Reversed, with directions.

\*179

\*Messrs. Louis Marshall, of New York City, Samuel W. Moore, of Kansas City, Mo., and Frank W. Swacker, of Washington, D. C., for plaintiff in error.

Mr. Patrick J. Farrell, of Washington, D. C., for defendant in error.

\*182

\*Mr. Chief Justice WHITE delivered the opinion of the Court.

The Act of Congress of March 1, 1913 (37 Stat. 701), amending the "Act to Regulate Commerce," imposed the duty upon the Interstate Commerce Commission (section 19a [Comp. St. § 8591]) to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this act." Specify-

ing the steps to be taken in the performance of the general duties thus imposed, the same section commanded as follows:

"First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said carrier for its purposes as a common carrier, \* \* \* the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. \* \* \*

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value. \* \* \*

"Fifth \* \* \* [seventh paragraph]. Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, \* \* \* stating the valuation placed

\*183

upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. \* \* \*

"If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto. \* \* \* All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the act approved February 4, 1887, commonly known as 'the Act to Regulate Commerce,' and the various acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Pursuant to these requirements the Commission proceeded to investigate and report the value of the property of the Kansas City Southern Railway Company. Upon completing a tentative valuation, the Commission gave the notice required by the statute to the railway company, which thereupon filed a protest against such valuation on the ground that in making it the Commission had failed to consider and include the "present cost of condemnation and damages or of purchase in excess of such original cost or present value." Upon the subject of the protest, the railway company took a large amount of testimony and much was also taken by the Commission, both parties having incurred considerable expense in the matter.

Pending this situation, in order that the excessive expense of taking each individual

parcel and showing what it would cost to acquire it or a right of way over it by purchase or condemnation might be avoided, an

\*184

agreement \*was entered into between the Director of the Bureau of Valuation of the Commission, C. A. Prouty, and the railway company, that in the event the Commission should decide that evidence upon the cost of acquiring land by purchase or condemnation would be received by it, the Bureau of Valuation would recommend to the Commission the percentage or multiplier of the naked value of the land, to be used for the purpose of reaching the railway cost of acquiring the same.

At that time there was also pending a protest concerning a tentative valuation made by the Commission as to the property of the Texas Midland Railroad Company, raising the same question as to error committed in failing to carry out the provisions of the statute concerning the present cost of condemnation, etc., in which case the Commission overruled the protest, holding that the provision of the statute in question was not susceptible of being enforced or acted upon for reasons stated by the Commission in part as follows (I. C. C. Val. Rep. 1, p. 54 et seq.):

"However, the direction in paragraph 'Second' for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of reproduction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that the lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

"Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay

\*185

sums in excess of the value of \*the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights. \* \* \*

"We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court (in the Minnesota Rate Cases [230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18]) as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the

Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear. \* \* \*

"Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

Applying the ruling thus made to the protest which was pending in this case, the Commission gave notice to the railway that the agreement made with the Director of the Bureau of Valuation concerning the method of proof would be treated as not further operative; and thereafter when an offer was

\*186

made by the railway before an exam\*iner of the Commission of further testimony concerning the subject in hand, it was excluded because in conflict with the ruling announced in the Midland Case. The Commission sustained this action of the examiner on the ground that that officer had rightly held that the ruling in the Midland Case was controlling; and the Commission therefore decided that no further testimony on the particular subject would be heard in this case, and that it would make no report concerning that subject.

This suit was then brought to obtain a mandamus to compel the Commission to hear the proof and act upon it under the statute. The amended petition, after reciting the facts as we have outlined them and making the appropriate formal averments to justify resort to mandamus, alleged:

"That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but \$60,000 with respect to parcels of land acquired by relator by judicial award in condemnation proceedings during four years immediately preceding such valuation at an actual cost to relator of \$180,000, and in the aggregate will result in a finding with respect to said lands at least \$5,000,000 less than the value so directed by the act of Congress above mentioned to be found."

It was further averred, with considerable elaboration, that the petitioner stood ready to produce proof to meet the requirements of the statute which was neither speculative nor impossible to be acted upon, since it would conform to the character of proof usually received in judicial proceedings involving the exercise of eminent domain.

The Commission in its answer, either stat-

\*187

ing or con\*ceding the history of the case as we have recited it, and summarily reiterat-



ing the grounds for the refusal by the Commission to receive the proof or report concerning it, challenged the right to the relief sought. A demurrer to the answer as stating no defense was overruled by the trial court, which denied relief without opinion. In the Court of Appeals, two judges sitting, the judgment of the trial court was affirmed by a divided court, also without opinion, and the case is here on writ of error to review that judgment.

It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the nonaction of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

[1] It is true that the Commission held that its nonaction was caused by the fact that the command of the statute involved a consideration by it of matters "beyond the possibility of rational determination," and called for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," and that such conclusions were the necessary consequence of the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistake

\*188

en \*conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest, though

it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.

[2] Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.

The judgment of the Court of Appeals is therefore reversed, with directions to reverse that of the Supreme Court, and direct the Supreme Court to grant a writ of mandamus in conformity with this opinion.

(252 U. S. 189)

EISNER, Internal Revenue Collector, v. MACOMBER.

(Argued April 16, 1919. Restored to Docket for Reargument, May 19, 1919. Reargued Oct. 17 and 20, 1919. Decided March 8, 1920.)

No. 318.

1. COURTS ⇐92 — REASONING FURNISHING BASIS FOR CONCLUSION NOT OBITER.

Reasoning of the court, which furnishes the entire basis for the conclusion reached, cannot be regarded as obiter dictum.

2. CONSTITUTIONAL LAW ⇐18—AMENDMENT TO BE CONSTRUED IN CONNECTION WITH ORIGINAL CONSTITUTION.

The Income Tax Amendment (Const. Amend. 16) must be construed in connection with the taxing clauses of the original Constitution, and the effect attributed to them before the amendment was adopted.

3. INTERNAL REVENUE ⇐7—EFFECT OF INCOME TAX AMENDMENT STATED.

Const. Amend. 16, did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income.

4. INTERNAL REVENUE ⇐4 — INCOME TAX AMENDMENT NOT TO BE EXTENDED BY CONSTRUCTION.

Const. Amend. 16, should not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal.

5. INTERNAL REVENUE ⇐7—STATUTORY DEFINITION OF INCOME NOT CONCLUSIVE.

The question of what constitutes income, within Const. Amend. 16, cannot be concluded by any definition which Congress may adopt.

# 6. INTERNAL REVENUE 7—"INCOME" DEFINED.

"Income" is the gain derived from capital, from labor, or from both combined; something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and received or drawn by the recipient for his separate use, benefit, and disposal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

# 7. CORPORATIONS 65—NATURE OF STOCKHOLDER'S INTEREST.

The interest of a stockholder is a capital interest, and his certificates of stock are but evidence of it.

# 8. CORPORATIONS 65—STOCKHOLDER CANNOT WITHDRAW ANY PART OF CORPORATE PROPERTY.

Short of liquidation, or until dividend declared, a stockholder may not withdraw any part of either capital or profits from the enterprise; his interest not pertaining to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company.

# 9. CORPORATIONS 65—TITLE TO PROPERTY IS IN CORPORATION, NOT IN STOCKHOLDERS.

The interest of a stockholder in the property, etc., of the company is not that of an owner, since the corporation has full legal and equitable title to the whole.

# 10. INTERNAL REVENUE 7 — STOCK DIVIDEND NOT "INCOME."

A stock dividend, consisting of new stock issued to the stockholders in proportion to their previous holdings, for profits capitalized, without any distribution of profits, is not "income," within Const. Amend. 16, and Revenue Act, Sept. 8, 1916, § 2 (Comp. St. § 6336b), in so far as it provides for the taxation thereof as income, without apportionment of the tax according to population, violates Const. art. 1, § 2, cl. 3, and section 9, cl. 4.

# 11. INTERNAL REVENUE 7—PROFIT ON SALE OF STOCK RECEIVED AS DIVIDEND IS "INCOME."

If a stockholder receiving a stock dividend sells the stock so received any profit on the sale is income, and, so far as it may have arisen since the Sixteenth Amendment, is taxable by Congress without apportionment according to population.

# 12. INTERNAL REVENUE 7 — CORPORATION MUST BE TREATED AS ENTITY IN DETERMINING WHAT CONSTITUTES INCOME.

In determining whether stock dividends constitute income, taxable under Const. Amend. 16, the corporation must be treated as a separate entity, as it is only by recognizing such separateness that any dividend can be regarded as income of the stockholder.

# 13. INTERNAL REVENUE 7 — ENRICHMENT THROUGH INCREASE IN VALUE OF CAPITAL INVESTMENT NOT "INCOME."

Enrichment through increase in value of capital investment is not income, within Const. Amend. 16.

# 14. INTERNAL REVENUE 2—TAX ON INTEREST OF STOCKHOLDER IN UNDIVIDED PROFITS MUST BE APPORTIONED.

Revenue Act Sept. 8, 1916, § 2 (Comp. St. § 6336b), providing that stock dividends shall be considered income, if construed as imposing the tax on the stockholder's interest in the accumulated and undivided profits, rather than on the dividend, is invalid, as taxing property because of ownership, without apportionment according to population.

Mr. Justice Brandeis, Mr. Justice Clarke, Mr. Justice Holmes, and Mr. Justice Day, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Myrtle H. Macomber against Mark Eisner, as Collector of Internal Revenue for the Third District of the State of New York. Judgment for plaintiff on demurrer, and defendant brings error. Affirmed.

Mr. Assistant Attorney General Frierson, for plaintiff in error.

Messrs. Charles E. Hughes and George Welwood Murray, both of New York City, for defendant in error.

## \*199

\*Mr. Justice PITNEY delivered the opinion of the Court.

This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916 (39 Stat. 756 et seq., c. 463 [Comp. St. § 6336a et seq.]), which, in our opinion (notwithstanding a contention of the govern-

## \*200

ment that will be \*noticed), plainly evinces the purpose of Congress to tax stock dividends as income.<sup>1</sup>

The facts, in outline, are as follows:

On January 1, 1916, the Standard Oil Company of California, a corporation of that state, out of an authorized capital stock of

## <sup>1</sup> Title I.—Income Tax.

### Part I.—On Individuals.

Sec. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived, \* \* \* also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: Provided, that the term "dividends" as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, \* \* \* out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, \* \* \* which stock dividend shall be considered income, to the amount of its cash value.



\$100,000,000, had shares of stock outstanding, par value \$100 each, amounting in round figures to \$50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business and required for the purposes of the corporation, amounting to about \$45,000,000, of which about \$20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent. of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received cer-

\*201

tificates for 1,100 additional \*shares, of which 18.07 per cent., or 198.77 shares, par value \$19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a tax imposed under the Revenue Act of 1916, based upon a supposed income of \$19,877 because of the new shares; and an appeal to the Commissioner of Internal Revenue having been disallowed, she brought action against the Collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the Sixteenth Amendment. A general demurrer to the complaint was overruled upon the authority of *Towne v. Eisner*, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

The case was argued at the last term, and reargued at the present term, both orally and by additional briefs.

We are constrained to hold that the judgment of the District Court must be affirmed: First, because the question at issue is controlled by *Towne v. Eisner*, supra; secondly, because a re-examination of the question with the additional light thrown upon it by elaborate arguments, has confirmed the view that the underlying ground of that decision is sound, that it disposes of the question here presented, and that other fundamental considerations lead to the same result.

In *Towne v. Eisner*, the question was whether a stock dividend made in 1914 against surplus earned prior to January 1,

1913, was taxable against the stockholder under the Act of October 3, 1913 (38 Stat. 114, 166, c. 16), which provided (section B, p. 167) that net income should include "dividends,"

\*202

and also "gains or profits and income derived from any source whatever." Suit having been brought by a stockholder to recover the tax assessed against him by reason of the dividend, the District Court sustained a demurrer to the complaint. 242 Fed. 702. The court treated the construction of the act as inseparable from the interpretation of the Sixteenth Amendment; and, having referred to *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and quoted the Amendment, proceeded very properly to say (242 Fed. 704):

"It is manifest that the stock dividend in question cannot be reached by the Income Tax Act and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income."

It declined, however, to accede to the contention that in *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, "stock dividends" had received a definition sufficiently clear to be controlling, treated the language of this court in that case as obiter dictum in respect of the matter then before it (242 Fed. 706), and examined the question as *res nova*, with the result stated. When the case came here, after overruling a motion to dismiss made by the government upon the ground that the only question involved was the construction of the statute and not its constitutionality, we dealt upon the merits with the question of construction only, but disposed of it upon consideration of the essential nature of a stock dividend disregarding the fact that the one in question was based upon surplus earnings that accrued before the Sixteenth Amendment took effect. Not only so, but we rejected the reasoning of the District Court, saying (245 U. S. 426, 38 Sup. Ct. 159, 62 L. Ed. 372, L. R. A. 1918D, 254):

"Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing

\*203

ing to the \*interests of the shareholders. Its property is not diminished, and their interests are not increased. \* \* \* The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.' *Gibbons v. Mahon*, 136 U. S. 549, 559, 560 [10 Sup. Ct. 1057, 34 L. Ed. 525]. In short, the corporation is no poorer and the stockholder



is no richer than they were before. *Logan County v. United States*, 169 U. S. 255, 261 [18 Sup. Ct. 361, 42 L. Ed. 737]. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of \$417,450, the sum upon which he was taxed. \* \* \* What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

This language aptly answered not only the reasoning of the District Court but the argument of the Solicitor General in this court, which discussed the essential nature of a stock dividend. And if, for the reasons thus expressed, such a dividend is not to be regarded as "income" or "dividends" within the meaning of the act of 1913, we are unable to see how it can be brought within the meaning of "incomes" in the Sixteenth Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the amendment. In *Towne v. Eisner* it was not contended that any construction of the statute could make it narrower than the constitutional grant; rather the contrary.

The fact that the dividend was charged against profits earned before the act of 1913 took effect, even before the amendment was adopted, was neither relied upon nor alluded to in our consideration of the merits in that case. Not only so, but had we considered that a stock dividend constituted income in any true sense, it would have been held taxable under the act of 1913 notwithstanding it was based upon profits earned before the amendment. We ruled at the same term, in *Lynch v. Hornby*, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149, that a cash dividend extraordinary in amount, and in *Peabody v. Eisner*, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152, that a dividend paid in stock of another company, were taxable as income although based upon earnings that accrued before adoption of the amendment. In the former case, concerning "corporate profits that accumulated before the act took effect," we declared (247 U. S. 343, 344, 38 Sup. Ct. 543, 545 [62 L. Ed. 1149]):

\*204

"Just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. \* \* \* Congress was at liberty under the amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing."

est that the stockholder had in a surplus of corporate assets previously existing."

In *Peabody v. Eisner*, 247 U. S. 349, 350, 38 Sup. Ct. 546, 547 (62 L. Ed. 1152), we observed that the decision of the District Court in *Towne v. Eisner* had been reversed "only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest," and we distinguished the *Peabody* Case from the *Towne* Case upon the ground that "the dividend of Baltimore & Ohio shares was not a stock dividend but a distribution in specie of a portion of the assets of the Union Pacific."

[1] Therefore *Towne v. Eisner* cannot be regarded as turning upon the point that the surplus accrued to the company before the act took effect and before adoption of the amendment. And what we have quoted from the opinion in that case cannot be regarded as obiter dictum, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there, not because that case in terms decided the constitutional question, for it did not, but because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

Nevertheless, in view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared (39 Stat. 757 [Comp. St. § 6336b]) that a "stock dividend shall be considered income, to the amount of its cash value," we will deal at length with the constitutional question, incidentally testing the soundness of our previous conclusion.

[2] The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, under the Act of August 27, 1894 (28 Stat. 509, 553, c. 349, § 27), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by article 1, § 2, cl. 3, and section 9, cl. 4, of the original Constitution.

[3] Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source

## \*206

derived, without apportionment among \*the several states, and without regard to any census or enumeration."

As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 17-19, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112 et seq., 36 Sup. Ct. 278, 60 L. Ed. 546; *Peck & Co. v. Lowe*, 247 U. S. 165, 172, 173, 38 Sup. Ct. 432, 62 L. Ed. 1049.

[4] A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

[5] In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term

## \*207

"in\*come," as used in common speech, in order to determine its meaning in the amendment, and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

[6] After examining dictionaries in common use (*Bouv. L. D.*; *Standard Dict.*; *Webster's Internat. Dict.*; *Century Dict.*), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence v. Howbert*, 231 U. S. 399, 415, 34 Sup. Ct. 136, 140 [58 L. Ed. 285]; *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 185, 38 Sup. Ct. 467, 469 [62 L. Ed. 1054]), "Income

may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case*, 247 U. S. 183, 185, 38 Sup. Ct. 467, 469 (62 L. Ed. 1054).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*Derived—from—capital*"; "*the gain—derived—from—capital*," etc. Here we have the essential matter: not a gain accruing to capital; not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being "*derived*"—that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—"incomes, from whatever source derived"—

## \*208

the essential thought being expressed \*with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

[7-9] Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or



profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return.

\*209

If he desires to dissociate himself \*from the company he can do so only by disposing of his stock.

[10] For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital stock account." If profits have been made and not divided they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.

In the present case, the corporation had surplus and undivided profits invested in

\*210

plant, property, and business, and required for the purposes of the corporation, amounting to about \$45,000,000, in addition to outstanding capital stock of \$50,000,000. In this the case is not extraordinary. The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, \*equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits,

or surplus, or some other account having like significance. If thereafter the company finds itself in funds beyond current needs it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode adopted in the case at bar—by declaring a "stock dividend." This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to capital stock account, equal to the proposed "dividend"; the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the "liability" acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing

\*211

"capital stock" at the expense of "surplus"; it does not alter the pre-existing proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar



of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of correct judgment and proper business policy on the part of its management, and a due regard for the interests of the stockholders. And we are considering the taxability of bona fide stock dividends only.

**\*212**

\*We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

[11] It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. Thus, if one holding \$60,000 out of a total \$100,000 of the capital stock of a corporation should receive in common with other stockholders a 50 per cent. stock dividend, and should sell his part, he thereby would be reduced from a majority to a minority stockholder, having six-fifteenths instead of six-tenths of the total stock outstanding. A corresponding and proportionate decrease in capital interest and in voting power would befall a minority holder should he sell dividend stock; it being in the nature of things impossible for one to dispose of any part of such an issue without a proportionate disturbance of the distribution of the entire capital stock, and a like diminution of the seller's comparative voting power—that

"right preservative of rights" in the control

**\*213**

\*Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the government, in a variety of forms, runs the fundamental error already mentioned—a failure to appraise correctly the force of the term "income" as used in the Sixteenth Amendment, or at least to give practical effect to it. Thus the government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. It contends that the tax may be laid when earnings "are received by the stockholder," whereas he has received none; that the profits are "distributed by means of a stock dividend," although a stock dividend distributes no profits; that under the act of 1916 "the tax is on the stockholder's share in corporate earnings," when in truth a stockholder has no such share, and receives none in a stock dividend; that "the profits are segregated from his former capital, and he has a separate certificate representing his invested profits or gains," whereas there has been no segregation of profits, nor has he any separate certificate representing a personal gain, since the certificates, new and old, are alike in what they represent—a capital interest in the entire concerns of the corporation.

[12] We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But,

**\*214**

looking through the form, \*we cannot disregard the essential truth disclosed, ignore the substantial difference between corporation and stockholder, treat the entire organization as unreal, look upon stockholders as partners, when they are not such, treat them as having in equity a right to a partition of the corporate assets, when they have none, and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it;

and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.

[13] Conceding that the mere issue of a stock dividend makes the recipient no richer than before, the government nevertheless contends that the new certificates measure the extent to which the gains accumulated by the corporation have made him the richer. There are two insuperable difficulties with this: In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations the measure would not hold true. Secondly, and more important for present purposes, enrichment through increase in

\*215

value \*of capital investment is not income in any proper meaning of the term.

The complaint contains averments respecting the market prices of stock such as plaintiff held, based upon sales before and after the stock dividend, tending to show that the receipt of the additional shares did not substantially change the market value of her entire holdings. This tends to show that in this instance market quotations reflected intrinsic values—a thing they do not always do. But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present, when the question must be, not what will the thing sell for, but what is it in truth and in essence.

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company, calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not, and for no citation of authority except *Peabody v. Eisner*, 247 U. S. 347, 349, 350, 38 Sup. Ct. 546, 62 L. Ed. 1152.

Two recent decisions, proceeding from courts of high jurisdiction, are cited in support of the position of the government.

\*216

\**Swan Brewery Co., Ltd. v. Rex*, [1914] A. C. 231, arose under the Dividend Duties Act of Western Australia, which provided that "dividend" should include "every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company," except, etc. There was a stock dividend, the new shares being allotted among the shareholders pro rata; and the question was whether this was a distribution of a dividend within the meaning of the act. The Judicial Committee of the Privy Council sustained the dividend duty upon the ground that, although "in ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend," yet, within the meaning of the act, such new shares were an "advantage" to the recipients. There being no constitutional restriction upon the action of the lawmaking body, the case presented merely a question of statutory construction, and manifestly the decision is not a precedent for the guidance of this court when acting under a duty to test an act of Congress by the limitations of a written Constitution having superior force.

In *Tax Commissioner v. Putnam* (1917) 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806, it was held that the Forty-Fourth amendment to the Constitution of Massachusetts, which conferred upon the Legislature full power to tax incomes, "must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income" (227 Mass. 526, 531, 116 N. E. 904, 907 [L. R. A. 1917F, 806]), and that under it a stock dividend was taxable as income; the court saying (227 Mass. 535, 116 N. E. 911, L. R. A. 1917F, 806):

"In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which instead of being paid out in cash is invested in the business, thus augmenting its durable assets. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared with the privilege of subscription to an equivalent amount of new shares."

\*217

\*We cannot accept this reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take the symbol for the substance, accumulation for distribution, capital accretion for its opposite; while a case where money is paid into the hand of the stockholder with an option to buy new shares with it, followed by acceptance of the option, was regarded as identical in substance with a case where the stockholder receives no money and has no option. The Massachusetts court was not under an obligation, like



the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction.

[14] Upon the second argument, the government, recognizing the force of the decision in *Towne v. Eisner*, supra, and virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that by the true construction of the act of 1916 the tax is imposed, not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question, and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.

The government relies upon *Collector v.*

*Hubbard* (1870) \*218 12 Wall. 1, (20 L. Ed. 272), which arose under section 117 of the act of June 30, 1864 (13 Stat. 223, 282, c. 173), providing that—

"The gains and profits of all companies, whether incorporated or partnership, other than the companies specified in that section, shall be included in estimating the annual gains, profits, or income of any person, entitled to the same, whether divided or otherwise."

The court held an individual taxable upon his proportion of the earnings of a corporation although not declared as dividends and although invested in assets not in their nature divisible. Conceding that the stockholder for certain purposes had no title prior to dividend declared, the court nevertheless said (12 Wall. 18, 20 L. Ed. 272):

"Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation

they serve to increase the market value of the shares, whether held by the original subscribers or by assignees."

In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in accumulated earnings prior to dividend declared, it must be regarded as overruled by *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 627, 628, 637, 15 Sup. Ct. 912, 39 L. Ed. 1108. Conceding *Collector v. Hubbard* was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not ap-

portioned \*219 among the states, the government nevertheless insists that the Sixteenth Amendment removed this obstacle, so that now the *Hubbard* Case is authority for the power of Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the amendment applies to income only, and what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the assets of the corporation, prior to dividend declared.

Thus, from every point of view we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid, notwithstanding the Sixteenth Amendment.

Judgment affirmed.

Mr. Justice HOLMES, dissenting.

I think that *Towne v. Eisner*, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, was right in its reasoning and result and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the Court might be different from that of the Constitution. 245 U. S. 425, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254. I think that the word "incomes" in the Sixteenth Amendment should be read

\*220 in "a sense most obvious to the common understanding at the time of its adoption." *Bishop v. State*, 149 Ind. 223, 230, 48 N. E. 1038, 1040, 39 L. R. A. 278, 63 Am. St. Rep. 270; *State v. Butler*, 70 Fla. 102, 133, 69 South. 771. For it was for public adoption that it was proposed. *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. Ed. 579. The



known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax. See *Tax Commissioner v. Putnam*, 227 Mass. 522, 532, 533, 116 N. E. 994, L. R. A. 1917F, 806.

Mr. Justice DAY concurs in this opinion.

Mr. Justice BRANDEIS delivered the following [dissenting] opinion:

Financiers, with the aid of lawyers, devised long ago two different methods by which a corporation can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders. One method is a simple one. The capital stock is increased; the new stock is paid up with the accumulated profits; and the new shares of paid-up stock are then distributed among the stockholders pro rata as a dividend. If the stockholder prefers ready money to increasing his holding of the stock in the company, he sells the new stock received as a dividend. The other method is slightly more complicated. Arrangements are made for an increase of stock to be offered to stockholders pro rata at par, and, at the same time, for the payment of a cash dividend equal to the amount which the stock-

holder will be required to pay to \*the company, if he avails himself of the right to subscribe for his pro rata of the new stock. If the stockholder takes the new stock, as is expected, he may endorse the dividend check received to the corporation and thus pay for the new stock. In order to ensure that all the new stock so offered will be taken, the price at which it is offered is fixed far below what it is believed will be its market value. If the stockholder prefers ready money to an increase of his holdings of stock, he may sell his right to take new stock pro rata, which is evidenced by an assignable instrument. In that event the purchaser of the rights repays to the corporation, as the subscription price of the new stock, an amount equal to that which it had paid as a cash dividend to the stockholder.

Both of these methods of retaining accumulated profits while in effect distributing them as a dividend had been in common use in the United States for many years prior to the adoption of the Sixteenth Amendment. They were recognized equivalents. Whether a particular corporation employed one or the other method was determined sometimes by requirements of the law under which the corporation was organized; sometimes it was determined by preferences of the individual officials of the corporation; and sometimes by stock market conditions. Whichever method was employed the resultant distribution of the new stock was commonly referred to as

a stock dividend. How these two methods have been employed may be illustrated by the action in this respect (as reported in *Moody's Manual*, 1918 Industrial, and the *Commercial and Financial Chronicle*) of some of the Standard Oil companies, since the disintegration pursuant to the decision of this court in 1911. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

(a) *Standard Oil Co. (of Indiana)*, an Indiana corporation. It had on December 31, 1911, \$1,000,000 capital stock (all common),

and a large surplus. On May 15, \*1912, it increased its capital stock to \$30,000,000, and paid a simple stock dividend of 2,900 per cent. in stock.<sup>2</sup>

(b) *Standard Oil Co. (of Nebraska)*, a Nebraska corporation. It had on December 31, 1911, \$600,000 capital stock (all common), and a substantial surplus. On April 15, 1912, it paid a simple stock dividend of 33⅓ per cent., increasing the outstanding capital to \$800,000. During the calendar year 1912 it paid cash dividends aggregating 20 per cent., but it earned considerably more, and had at the close of the year again a substantial surplus. On June 20, 1913, it declared a further stock dividend of 25 per cent., thus increasing the capital to \$1,000,000.<sup>3</sup>

(c) *The Standard Oil Co. (of Kentucky)*, a Kentucky corporation. It had on December 31, 1913, \$1,000,000 capital stock (all common) and \$3,701,710 surplus. Of this surplus \$902,457 had been earned during the calendar year 1913, the net profits of that year having been \$1,002,457 and the dividends paid only \$100,000 (10 per cent.). On December 22, 1913, a cash dividend of \$200 per share was declared payable on February 14, 1914, to stockholders of record January 31, 1914, and these stockholders were offered the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor. The outstanding stock was thus increased to \$3,000,000. During the calendar years 1914, 1915, and 1916, quarterly dividends were paid on this stock at an annual rate of between 15 per cent. and 20 per cent., but the company's surplus increased by \$2,347,614, so that on December 31, 1916, it had a large surplus over its \$3,000,000 capital stock. On December 15, 1916, the company issued a circular to the stockholders, saying:

"The company's business for this year has

shown a \*very good increase in volume and a proportionate increase in profits, and it is estimated that by January 1, 1917, the company will have a surplus of over \$4,000,000. The

<sup>2</sup> *Moody's*, p. 1544; *Commercial and Financial Chronicle*, vol. 94, p. 331; vol. 98, pp. 1005, 1076.

<sup>3</sup> *Moody's*, p. 1548; *Commercial and Financial Chronicle*, vol. 94, p. 771; vol. 96, p. 1428; vol. 97, p. 1434; vol. 98, p. 1541.

board feels justified in stating that if the proposition to increase the capital stock is acted on favorably, it will be proper in the near future to declare a cash dividend of 100 per cent. and to allow the stockholders the privilege pro rata according to their holdings, to purchase the new stock at par, the plan being to allow the stockholders, if they desire, to use their cash dividend to pay for the new stock."

The increase of stock was voted. The company then paid a cash dividend of 100 per cent., payable May 1, 1917, again offering to such stockholders the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor.

Moody's Manual, describing the transaction with exactness, says first that the stock was increased from \$3,000,000 to \$6,000,000, "a cash dividend of 100 per cent., payable May 1, 1917, being exchanged for one share of new stock, the equivalent of a 100 per cent. stock dividend." But later in the report giving, as customary in the Manual the dividend record of the company, the Manual says: "A stock dividend of 200 per cent. was paid February 14, 1914, and one of 100 per cent. on May 1, 1917." And in reporting specifically the income account of the company for a series of years ending December 31, covering net profits, dividends paid and surplus for the year, it gives, as the aggregate of dividends for the year 1917, \$660,000 (which was the aggregate paid on the quarterly cash dividend—5 per cent. January and April; 6 per cent. July and October), and adds in a note: "In addition a stock dividend of 100 per cent. was paid during the year." \* The

\*224

Wall Street Journal of \*May 2, 1917, p. 2, quotes the 1917 "high" price for Standard Oil of Kentucky as "375 ex stock dividend."

It thus appears that among financiers and investors the distribution of the stock, by whichever method effected, is called a stock dividend; that the two methods by which accumulated profits are legally retained for corporate purposes and at the same time distributed as dividends are recognized by them to be equivalents; and that the financial results to the corporation and to the stockholders of the two methods are substantially the same—unless a difference results from the application of the federal Income Tax Law.

Mrs. Macomber, a citizen and resident of New York, was, in the year 1916, a stockholder in the Standard Oil Company (of California), a corporation organized under the laws of California and having its principal place of business in that state. During that year she received from the company a stock divi-

dend representing profits earned since March 1, 1913. The dividend was paid by direct issue of the stock to her according to the simple method described above, pursued also by the Indiana and Nebraska companies. In 1917 she was taxed under the federal law on the stock dividend so received at its par value of \$100 a share, as income received during the year 1916. Such a stock dividend is income, as distinguished from capital, both under the law of New York and under the law of California, because in both states every dividend representing profits is deemed to be income, whether paid in cash or in stock. It had been so held in New York, where the question arose as between life tenant and remainderman, *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796; *Matter of Osborne*, 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298; and also, where the question arose in matters of taxation, *People v.*

\*225

*Glynn*, \*130 App. Div. 332, 114 N. Y. Supp. 460; *Id.* 198 N. Y. 605, 92 N. E. 1097. It has been so held in California, where the question appears to have arisen only in controversies between life tenant and remainderman. *Estate of Duffill*, 183 Pac. 337.

It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky; that is, issuing rights to take new stock pro rata and paying to each stockholder simultaneously a dividend in cash sufficient in amount to enable him to pay for this pro rata of new stock to be purchased—the dividend so paid to him would have been taxable as income, whether he retained the cash or whether he returned it to the corporation in payment for his pro rata of new stock. But it is contended that, because the simple method was adopted of having the new stock issued direct to the stockholders as paid-up stock, the new stock is not to be deemed income, whether she retained it or converted it into cash by sale. If such a different result can flow merely from the difference in the method pursued, it must be because Congress is without power to tax as income of the stockholder either the stock received under the latter method or the proceeds of its sale; for Congress has, by the provisions in the Revenue Act of 1916, expressly declared its purpose to make stock dividends, by whichever method paid, taxable as income.

The Sixteenth Amendment, proclaimed February 25, 1913, declares:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

\* Moody's, p. 1547; Commercial and Financial Chronicle, vol. 97, pp. 1589, 1827, 1903; vol. 98, pp. 76, 457; vol. 103, p. 2348. Poor's Manual of Industries (1918), p. 2240, in giving the "comparative income account" of the company, describes the 1914 dividend as "stock dividend paid (200 per cent.)—\$2,000,000," and describes the 1917 dividend as "\$3,000,000 special cash dividend."

The Revenue Act of September 8, 1916, c. 463, § 2a, 39 Stat. 756, 757, provided:



"That the term 'dividends' as used in this title shall \*be held to mean any distribution made or ordered to be made by a corporation, \* \* \* out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, \* \* \* which stock dividend shall be considered income, to the amount of its cash value."

Hitherto powers conferred upon Congress by the Constitution have been liberally construed, and have been held to extend to every means appropriate to attain the end sought. In determining the scope of the power the substance of the transaction, not its form has been regarded. *Martin v. Hunter*, 1 Wheat, 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 407, 415, 4 L. Ed. 579; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678; *Craig v. Missouri*, 4 Pet. 410, 433, 7 L. Ed. 903; *Jarrolt v. Moberly*, 103 U. S. 580, 585, 587, 26 L. Ed. 492; *Legal Tender Case*, 110 U. S. 421, 444, 4 Sup. Ct. 122, 28 L. Ed. 204; *Lithograph Co. v. Sarony*, 111 U. S. 53, 58, 4 Sup. Ct. 279, 28 L. Ed. 349; *United States v. Realty Co.*, 163 U. S. 427, 440, 441, 442, 16 Sup. Ct. 1120, 41 L. Ed. 215; *South Carolina v. United States*, 199 U. S. 437, 448, 449, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. Is there anything in the phraseology of the Sixteenth Amendment or in the nature of corporate dividends which should lead to a departure from these rules of construction and compel this court to hold, that Congress is powerless to prevent a result so extraordinary as that here contended for by the stockholder?

First. The term "income," when applied to the investment of the stockholder in a corporation, had, before the adoption of the Sixteenth Amendment, been commonly understood to mean the returns from time to time received by the stockholder from gains or earnings of the corporation. A dividend received by a stockholder from a corporation may be either in distribution of capital assets or in distribution of profits. Whether it is the one or the other is in no way affected by the medium in which it is paid, nor by the method or means through which the particular thing distributed as a dividend was pro-

cured. If the \*dividend is declared payable in cash, the money with which to pay it is ordinarily taken from surplus cash in the treasury. But (if there are profits legally available for distribution and the law under which the company was incorporated so permits) the company may raise the money by discounting negotiable paper; or by selling bonds, scrip or stock of another corporation then in the treasury; or by selling its own bonds, scrip or stock then in the treasury; or by selling its own bonds, scrip or stock issued expressly for that purpose. How the money shall be raised is whol-

ly a matter of financial management. The manner in which it is raised in no way affects the question whether the dividend received by the stockholder is income or capital; nor can it conceivably affect the question whether it is taxable as income.

Likewise whether a dividend declared payable from profits shall be paid in cash or in some other medium is also wholly a matter of financial management. If some other medium is decided upon, it is also wholly a question of financial management whether the distribution shall be, for instance, in bonds, scrip or stock of another corporation or in issues of its own. And if the dividend is paid in its own issues, why should there be a difference in result dependent upon whether the distribution was made from such securities then in the treasury or from others to be created and issued by the company expressly for that purpose? So far as the distribution may be made from its own issues of bonds, or preferred stock created expressly for the purpose, it clearly would make no difference in the decision of the question whether the dividend was a distribution of profits, that the securities had to be created expressly for the purpose of distribution. If a dividend paid in securities of that nature represents a distribution of profits Congress may, of course, tax it as income of the stockholder. Is the result different where the security distributed is common stock?

\*Suppose that a corporation having power to buy and sell its own stock, purchases, in the interval between its regular dividend dates, with moneys derived from current profits, some of its own common stock as a temporary investment, intending at the time of purchase to sell it before the next dividend date and to use the proceeds in paying dividends, but later, deeming it inadvisable either to sell this stock or to raise by borrowing the money necessary to pay the regular dividend in cash, declares a dividend payable in this stock; can any one doubt that in such a case the dividend in common stock would be income of the stockholder and constitutionally taxable as such? See *Green v. Bissell*, 79 Conn. 547, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; *Leland v. Hayden*, 102 Mass. 542. And would it not likewise be income of the stockholder subject to taxation if the purpose of the company in buying the stock so distributed had been from the beginning to take it off the market and distribute it among the stockholders as a dividend, and the company actually did so? And proceeding a short step further: Suppose that a corporation decided to capitalize some of its accumulated profits by creating additional common stock and selling the same to raise working capital, but after the stock has been issued and certificates therefor are deliver-



ed to the bankers for sale, general financial conditions make it undesirable to market the stock and the company concludes that it is wiser to husband, for working capital, the cash which it had intended to use in paying stockholders a dividend, and, instead, to pay the dividend in the common stock which it had planned to sell; would not the stock so distributed be a distribution of profits—and hence, when received, be income of the stockholder and taxable as such? If this be conceded, why should it not be equally income of the stockholder, and taxable as such, if the common stock created by capitalizing profits, had been originally created for the

\*229

express purpose of being distributed as a dividend to the stockholder who afterwards received it?

Second. It has been said that a dividend payable in bonds or preferred stock created for the purpose of distributing profits may be income and taxable as such, but that the case is different where the distribution is in common stock created for that purpose. Various reasons are assigned for making this distinction. One is that the proportion of the stockholder's ownership to the aggregate number of the shares of the company is not changed by the distribution. But that is equally true where the dividend is paid in its bonds or in its preferred stock. Furthermore, neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved. Another reason assigned is that the value of the old stock held is reduced approximately by the value of the new stock received, so that the stockholder after receipt of the stock dividend has no more than he had before it was paid. That is equally true whether the dividend be paid in cash or in other property, for instance, bonds, scrip or preferred stock of the company. The payment from profits of a large cash dividend, and even a small one, customarily lowers the then market value of stock because the undivided property represented by each share has been correspondingly reduced. The argument which appears to be most strongly urged for the stockholders is, that when a stock dividend is made, no portion of the assets of the company is thereby segregated for the stockholder. But does the issue of new bonds or of preferred stock created for use as a dividend result in any segregation of assets for the stockholder? In each case he receives a piece of paper which entitles him to certain rights in the undivided property. Clearly segregation of assets in a physical sense is not an essential of income. The year's gains of a partner is taxable as income, although there,

\*230

likewise, no segregation of his share in the gains from that of his partners is had.

The objection that there has been no segregation is presented also in another form. It is argued that until there is a segregation, the stockholder cannot know whether he has really received gains; since the gains may be invested in plant or merchandise or other property and perhaps be later lost. But is not this equally true of the share of a partner in the year's profits of the firm or, indeed, of the profits of the individual who is engaged in business alone? And is it not true, also, when dividends are paid in cash? The gains of a business, whether conducted by an individual, by a firm or by a corporation, are ordinarily reinvested in large part. Many a cash dividend honestly declared as a distribution of profits, proves later to have been paid out of capital, because errors in forecast prevent correct ascertainment of values. Until a business adventure has been completely liquidated, it can never be determined with certainty whether there have been profits unless the returns at least exceeded the capital originally invested. Business men, dealing with the problem practically, fix necessarily periods and rules for determining whether there have been net profits—that is, income or gains. They protect themselves from being seriously misled by adopting a system of depreciation charges and reserves. Then, they act upon their own determination, whether profits have been made. Congress in legislating has wisely adopted their practices as its own rules of action.

Third. The Government urges that it would have been within the power of Congress to have taxed as income of the stockholder his pro rata share of undistributed profits earned, even if no stock dividend representing it had been paid. Strong reasons may be assigned for such a view. See *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272. The undivided share of a partner in the year's undistrib-

\*231

ed profits of his firm \*is taxable as income of the partner, although the share in the gain is not evidenced by any action taken by the firm. Why may not the stockholder's interest in the gains of the company? The law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result. *Linn Timber Co. v. United States*, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725. See *Morawetz on Corporations* (2d Ed.) §§ 227-231; *Cook on Corporations* (7th Ed.) §§ 663, 664. The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a cor-

poration.<sup>5</sup> No reason appears, why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court. But we have no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings. For Congress has in this act limited the income tax to that share of the stockholder in the earnings which is, in effect, distributed by means of the stock dividend paid. In other words to render the stockholder taxable there must be both earnings made and a dividend paid. Neither earnings without dividend—nor a dividend

\*232

without earnings—subjects the \*stockholder to taxation under the Revenue Act of 1916.

Fourth. The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made, if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid or in the year preceding. But this court, construing liberally, not only the constitutional grant of power, but also the revenue act of 1913, held that Congress might tax, and had taxed, to the stockholder dividends received during the year, although earned by the company long before; and even prior to the adoption of the Sixteenth Amendment. *Lynch v. Hornby*, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149.<sup>6</sup> That rule, if indiscriminately applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship, and have raised serious questions. Many corporations, without legally capitalizing any part of their profits, had assigned definitely some part or all of the annual balances remaining after paying the usual cash dividends, to the uses to which permanent capital is ordinarily applied. Some of the corporations doing this, transferred such balances on their books to

"surplus" account—distinguishing between such permanent "surplus" and the "undivided profits" account. Other corporations, without this formality, had assumed that the annual accumulating balances carried as undistributed profits were to be treated as capital permanently invested in the business. And still others, without definite assumption

\*233

of any kind, had \*so used undivided profits for capital purposes. To have made the revenue law apply retroactively so as to reach such accumulated profits, if and whenever it should be deemed desirable to capitalize them legally by the issue of additional stock distributed as a dividend to stockholders, would have worked great injustice. Congress endeavored in the Revenue Act of 1916 to guard against any serious hardship which might otherwise have arisen from making taxable stock dividends representing accumulated profits. It did not limit the taxability to stock dividends representing profits earned within the tax year or in the year preceding; but it did limit taxability to such dividends representing profits earned since March 1, 1913. Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income. And Congress sought by section 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336c) to discourage the postponement of distribution for the illegitimate purpose of evading liability to surtaxes.

Fifth. The decision of this court, that earnings made before the adoption of the Sixteenth Amendment, but paid out in cash dividend after its adoption, were taxable as income of the stockholder, involved a very liberal construction of the amendment. To hold now that earnings both made and paid out after the adoption of the Sixteenth Amendment cannot be taxed as income of the stockholder, if paid in the form of a stock dividend, involves an exceedingly narrow construction of it. As said by Mr. Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419, 446 (6 L. Ed. 678):

"To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

No decision heretofore rendered by this court requires us to hold that Congress, in pro-

\*234

viding for the taxation of \*stock dividends, exceeded the power conferred upon it by the Sixteenth Amendment. The two cases mainly relied upon to show that this was beyond the power of Congress are *Towne v. Eisner*, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, which involved a question not of constitutional power but of statutory construction, and *Gibbons v. Ma-*

<sup>5</sup> See *Some Judicial Myths*, by Francis M. Burk, 22 *Harvard Law Review*, 393, 394-396; *The Firm as a Legal Person*, by William Hamilton Cowles, 57 *Cent. L. J.*, 343, 348; *The Separate Estates of Non-Bankrupt Partners*, by J. D. Brannan, 20 *Harvard Law Review*, 589-592. Compare *Harvard Law Review*, vol. 7, p. 426; vol. 14, p. 222; vol. 17, p. 194.

<sup>6</sup> The hardship supposed to have resulted from such a decision has been removed in the Revenue Act of 1916 as amended, by providing in section 31b (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336c) that such cash dividends shall thereafter be exempt from taxation, if before they are made all earnings made since February 28, 1913, shall have been distributed. Act Oct. 3, 1917, c. 63, § 1211, 40 Stat. 333, Act Feb. 24, 1919, c. 18, § 201(b), 40 Stat. 1059 (Comp. St. Ann. Supp. 1919, § 6336½b).



hon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, which involved a question arising between life tenant and remainderman. So far as concerns *Towne v. Eisner* we have only to bear in mind what was there said (245 U. S. 425, 38 Sup. Ct. 159, 62 L. Ed. 372, L. R. A. 1918D, 254): "But it is not necessarily true that income means the same thing in the Constitution and the [an] act." <sup>7</sup> *Gibbons v. Mahon* is even less an authority for a narrow construction of the power to tax incomes conferred by the Sixteenth Amendment. In that case the court was required to determine how, in the administration of an estate in the District of Columbia, a stock dividend, representing profits, received after the decedent's death, should be disposed of as between life tenant and remainderman. The question was in essence: What shall the intention of the testator be presumed to have been? On this question there was great diversity of opinion and practice in the courts of English-speaking countries. Three well-defined rules were then competing for acceptance; two of these involves an arbitrary rule of distribution, the third equitable apportionment. See *Cook on Corporations* (7th Ed.) §§ 552-558.

1. The so-called English rule, declared in 1799, by *Brander v. Brander*, 4 Ves. Jr. 800,

\*235

that a dividend representing profits, whether in cash, stock or other property, belongs to the life tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, that a dividend representing profits, whether regular, ordinary or extraordinary, if in cash belongs to the life tenant, and if in stock belongs to the remainderman.

3. The so-called Pennsylvania rule declared in 1857 by *Earp's Appeal*, 28 Pa. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary or an extraordinary one, was paid. If it finds that the stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman.

This court adopted in *Gibbons v. Mahon* as

the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the states. The so-called Massachusetts rule, although approved by this court, has found favor in only a few states. The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the states (including New York and California), that it has come to be known as the "American rule." Whether, in view of these facts and the practical results of the operation of the two rules as shown by the experience of the 30 years which have elapsed since the decision in *Gibbons v. Mahon*, it might be desirable for this court to reconsider the question there decid-

\*236

ed, as \*some other courts have done (see 29 Harvard Law Review, 551), we have no occasion to consider in this case. For, as this court there pointed out (136 U. S. 560, 1059 [34 L. Ed. 525]), the question involved was one "between the owners of successive interests in particular shares," and not, as in *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840, a question "between the corporation and the government, and [which] depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings."

We have, however, not merely argument; we have examples which should convince us that "there is no inherent, necessary and immutable reason why stock dividends should always be treated as capital." Tax Commissioner v. Putnam, 227 Mass. 522, 533, 116 N. E. 904, L. R. A. 1917F, 806. The Supreme Judicial Court of Massachusetts has steadfastly adhered, despite ever-renewed protest, to the rule that every stock dividend is, as between life tenant and remainderman, capital and not income. But in construing the Massachusetts Income Tax Amendment, which is substantially identical with the federal amendment, that court held that the Legislature was thereby empowered to levy an income tax upon stock dividends representing profits. The courts of England have, with some relaxation, adhered to their rule that every extraordinary dividend is, as between life tenant and remainderman, to be deemed capital. But in 1913 the Judicial Committee of the Privy Council held that a stock dividend representing accumulated profits was taxable like an ordinary cash dividend, *Swan Brewery Company, Limited v. The King*, L. R. 1914 A. C. 231. In dismissing the appeal these words of the Chief Justice of the Supreme Court of Western Australia were quoted (page 236) which show that the facts involved were identical with those in the case at bar:

"Had the company distributed the £101,450 among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the £101,-

<sup>7</sup> Compare *Rugg, C. J.*, in *Tax Commissioner v. Putnam*, 227 Mass. 522, 533, 116 N. E. 904, 910 (L. R. A. 1917F, 806): "However strong such an argument might be when urged as to the interpretation of a statute, it is not of prevailing force as to the broad considerations involved in the interpretation of an amendment to the Constitution adopted under the conditions preceding and attendant upon the ratification of the forty-fourth amendment."



\*237

450 \*would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is."

Sixth. If stock dividends representing profits are held exempt from taxation under the Sixteenth Amendment, the owners of the most successful businesses in America will, as the facts in this case illustrate, be able to escape taxation on a large part of what is actually their income. So far as their profits are represented by stock received as dividends they will pay these taxes not upon their income but only upon the income of their income. That such a result was intended by the people of the United States when adopting the Sixteenth Amendment is inconceivable. Our sole duty is to ascertain their intent as therein expressed.<sup>8</sup> In terse, comprehensive language befitting the Constitution, they empowered Congress "to lay and collect taxes on incomes from whatever source derived." They intended to include thereby everything which by reasonable understanding can fairly be regarded as income. That stock dividends representing profits are so regarded, not only by the plain people, but by investors and financiers, and by most of the courts of the country, is shown, beyond peradventure, by their acts and by their utterances. It seems to me clear, therefore, that Congress possesses the power which it exercised to make dividends representing profits, taxable as income, whether the medi-

<sup>8</sup> Compare *Rugg, C. J., Tax Commissioner v. Putnam*, 227 Mass. 522, 524, 116 N. E. 904, 910 (L. R. A. 1917F, 806): "It is a grant from the sovereign people and not the exercise of a delegated power. It is a statement of general principles and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a state and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose."

um in which the dividend is paid be cash or stock, and that it may define, as it has done,

\*238

what dividends represent profits shall be deemed income. It surely is not clear that the enactment exceeds the power granted by the Sixteenth Amendment. And, as this court has so often said, the high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case.<sup>9</sup>

"It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 269, 6 L. Ed. 606.

Mr. Justice CLARKE concurs in this opinion.

<sup>9</sup> "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *The Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496 (1878). See also *Legal Tender Cases*, 12 Wall. 457, 531, 20 L. Ed. 287 (1870); *Trade Mark Cases*, 100 U. S. 82, 96, 25 L. Ed. 550 (1879). See *American Doctrine of Constitutional Law* by James B. Thayer, 7 *Harvard Law Review*, 129, 142.

"With the exception of the extraordinary decree rendered in the *Dred Scott Case*, \* \* \* all of the acts or the portions of the acts of Congress invalidated by the courts before 1868 related to the organization of courts. Denying the power of Congress to make notes legal tender seems to be the first departure from this rule." *Haines, American Doctrine of Judicial Supremacy*, p. 238. The first legal tender decision was overruled in part two years later (1870), *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; and again in 1883, *Legal Tender Case*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

(252 U. S. 239)

## PIERCE et al. v. UNITED STATES.

(Argued Nov. 18 and 19, 1919. Decided March 8, 1920.)

No. 234.

1. COURTS ⇨385(6)—ON DIRECT WRIT OF ERROR SUPREME COURT'S JURISDICTION CONTINUES, THOUGH CONSTITUTIONAL QUESTIONS HAVE BEEN DISPOSED OF.

On a direct writ of error to the Supreme Court, sued out under Judicial Code, § 238 (Comp. St. § 1215), because of contentions that statutes were unconstitutional, the jurisdiction continues for the purpose of disposing of other questions, though the constitutional questions have since been set at rest by other decisions.

2. CONSPIRACY ⇨43(11)—INDICTMENT SUFFICIENTLY ALLEGED CONSPIRACY AND OVERT ACTS UNDER ESPIONAGE ACT.

A count alleging that defendants conspired together and with unknown persons to commit the offense of unlawfully, feloniously, and willfully attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces, and to the injury of the United States in, through, and by personal solicitations, public speeches, and distributing certain pamphlets which should persistently urge insubordination, etc., and that they made personal solicitations and public speeches, and distributed such pamphlets, showed a sufficiently definite averment of a conspiracy and overt acts, under Espionage Act June 15, 1917, tit. 1, §§ 3, 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212c, 10212d).

3. CONSPIRACY ⇨26—FAILURE TO AGREE AS TO PRECISE METHOD OF VIOLATING LAW DOES NOT PREVENT PUNISHMENT.

A conspiracy, under Espionage Act, tit. 1, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d), when attempted to be carried into effect, is none the less punishable because the conspirators do not agree in advance upon the precise method in which the law shall be violated.

4. CONSPIRACY ⇨43(5) — ALLEGATIONS REGARDING CANNOT BE AIDED BY ALLEGATIONS OF OVERT ACTS.

The averment of a conspiracy under Espionage Act, tit. 1, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d), cannot be aided by allegations respecting overt acts.

5. CONSPIRACY ⇨27—OVERT ACTS NEED NOT BE CRIMINAL ACTS.

Though, under Espionage Act, tit. 1, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d), a mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be itself a criminal act.

6. CONSPIRACY ⇨43(4)—INDICTMENT FAIRLY IMPORTED UNLAWFUL MOTIVE.

Counts charging a violation of, and a conspiracy to violate, the Espionage Act, fairly imported an unlawful motive, where they charged that defendants unlawfully, willfully, and feloniously committed the forbidden acts.

7. INDICTMENT AND INFORMATION ⇨150—QUESTION WHETHER PAMPHLETS DISTRIBUTED HAD A NATURAL TENDENCY TO PRODUCE FORBIDDEN CONSEQUENCES NOT DETERMINABLE ON DEMURRER.

In a prosecution for making false reports or false statements, with intent to interfere with the operation or success of the military or naval forces, etc., attempting to cause insubordination, etc., and conspiring to commit the offense of attempting to cause insubordination, etc., whether statements contained in a pamphlet, distributed by defendants, had a natural tendency to produce the forbidden consequences, was not a question determinable on demurrer.

8. ARMY AND NAVY ⇨40—DISTRIBUTION OF PAMPHLET WITH KNOWLEDGE OF CONTENTS CHARGED DEFENDANTS WITH INTENT TO BRING ABOUT CONSEQUENCES REASONABLY TO BE ANTICIPATED.

Where defendants distributed the pamphlet, the distribution of which was charged to constitute a violation of the Espionage Act, with full understanding of its contents, they were charged with an intent and attempt to bring about any and all such consequences as reasonably might be anticipated from its distribution.

9. ARMY AND NAVY ⇨40—INTERPRETATION OF PAMPHLET DISTRIBUTED AND PROBABLE EFFECT QUESTIONS FOR JURY.

In a prosecution for violating the Espionage Act, by distributing a highly colored and sensational pamphlet, denouncing the war and protesting against its further prosecution, where the jury might fairly find that it would have a tendency to cause insubordination and disloyalty and refusal of duty, and amounted to an obstruction of the recruiting and enlistment service, its interpretation and probable effect were questions for the jury.

10. ARMY AND NAVY ⇨40—MOTIVES OF DEFENDANTS IN DISTRIBUTING PAMPHLET A QUESTION FOR THE JURY.

Where the jury might reasonably have found that a pamphlet distributed by defendants would have a tendency to cause insubordination, etc., and amount to an obstruction of the recruiting and enlistment service, their motives in distributing it were questions for the jury, though they testified that their sole purpose was to gain converts for Socialism.

11. ARMY AND NAVY ⇨40—EFFECT OF DISTRIBUTION OF PAMPHLET A QUESTION FOR THE JURY.

Where the jury might reasonably have found that a pamphlet distributed by defendants would have a tendency to cause insubordination, etc., and obstruct the recruiting and enlistment service, whether it would in fact produce, as a proximate result, a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide, in view of all the circumstances and the place and manner of distribution.

12. CONSPIRACY ⇨47—ACTS OF DEFENDANT IN CONCERT IN DISTRIBUTING PAMPHLET KNOWING ITS CONTENTS CONSTITUTED SUFFICIENT EVIDENCE OF CONSPIRACY AND OVERT ACTS.

Concert of action on the part of defendants in distributing, with knowledge of its contents,

a pamphlet denouncing the war, and protesting against its further prosecution, and having a tendency to cause insubordination, etc., and obstruct the recruiting and enlistment service, constituted sufficient evidence of a conspiracy and overt acts to sustain a conviction.

13. WAR ⚡4 — EVIDENCE ADMISSIBLE TO SHOW FALSITY OF STATEMENT DISTRIBUTED WITH INTENT TO INTERFERE WITH MILITARY AND NAVAL FORCES.

In a prosecution for making and distributing, with intent to interfere with the operation and success of the military and naval forces, false reports and statements, including the statement that the Attorney General was so busy sending men to prison, who did not stand up when the Star Spangled Banner was played, that he had no time to protect the food supply from gamblers, testimony of the United States attorney that no federal law made it a crime not to stand up when the Star Spangled Banner was played, and that he had no knowledge of prosecutions for failure to do so, was admissible to show the falsity of such statements.

14. WAR ⚡4 — EVIDENCE ADMISSIBLE TO SHOW FALSITY OF STATEMENT DISTRIBUTED WITH INTENT TO INTERFERE WITH MILITARY AND NAVAL FORCES.

On a trial for making and distributing, with intent to interfere with the operation and success of the military and naval forces, false reports and statements, including the statement that our entry into the war was determined by the certainty that, if the Allies did not win, loans to the Allies would be repudiated, the declaration of war and the President's address to Congress on April 2d preceding were admissible to show the falsity of such statements.

15. CRIMINAL LAW ⚡862—COMMON KNOWLEDGE HELD TO JUSTIFY FINDING THAT STATEMENTS WITH INTENT TO INTERFERE WITH MILITARY AND NAVAL FORCES WERE FALSE.

In a prosecution under the Espionage Act, the jury were warranted by common knowledge in finding that statements distributed by defendants that the Attorney General was sending men to prison for not standing up when the Star Spangled Banner was played, and that our entry into the war was determined by the certainty that, if the Allies did not win, loans to them would be repudiated, were false and known to be false by defendants, or distributed recklessly, without effort to ascertain their truth.

16. CRIMINAL LAW ⚡741(1)—WHETHER EVIDENCE REMOVES REASONABLE DOUBT IS QUESTION FOR JURY.

Where there is substantial evidence in support of the charges, the question whether its effect is to overcome any reasonable doubt of guilt is a question for the jury, and not for the court.

17. WAR ⚡4—ESPIONAGE ACT APPLIES TO FALSE STATEMENTS, THOUGH PURPORTING TO BE COMMENTS ON MATTERS OF PUBLIC KNOWLEDGE.

Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), prohibiting the making of false statements or reports with intent to interfere with the operation or success of the military or naval forces, applies, though the false state-

ments purport to constitute comment on matters pretended to be facts of public knowledge.

18. CRIMINAL LAW ⚡1167(2)—INSUFFICIENCY OF COUNT NOT GROUND FOR REVERSAL WHEN SENTENCE JUSTIFIED BY GOOD COUNTS.

The conceded insufficiency of one count of an indictment does not warrant a reversal, where the sentences imposed did not exceed those which might lawfully have been imposed under the good counts.

Mr. Justice Brandeis and Mr. Justice Holmes, dissenting.

In error to the District Court of the United States for the Northern District of New York.

Cinton H. Pierce and others were convicted of offenses under the Espionage Act (245 Fed. 878), and they bring error. Affirmed.

See, also, 245 Fed. 888.

\*240

\*Mr. Frederick A. Mohr, of Auburn, N. Y., for plaintiffs in error.

Mr. Assistant Attorney General Stewart, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

Plaintiffs in error were jointly indicted October 2, 1917, in the United States District Court for the Northern District of New York, upon six counts, of which the fourth and fifth were struck out by agreement at the trial and the first is now abandoned by the government.

The second count charged that throughout

\*241

the period from \*April 6, 1917, to the date of the presentation of the indictment, the United States being at war with the Imperial German government, defendants at the city of Albany, in the Northern district of New York and within the jurisdiction, etc., unlawfully and feloniously conspired together and with other persons to the grand jurors unknown to commit an offense against the United States, to wit:

"The offense of unlawfully, feloniously and willfully attempting to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States when the United States was at war and to the injury of the United States in, through, and by personal solicitations, public speeches and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called 'The Price We Pay,' which said pamphlets were to be distributed publicly throughout the Northern district of New York, and which said solicitations, speeches, articles and pamphlets would and should persistently urge insubordination, disloyalty and refusal of duty in the said military and naval forces of the United States to the injury of the United States and its military and naval service and failure and refusal on the part of available persons to enlist therein and should and would through and by means above mentioned obstruct the recruiting and enlistment service of the United States when the United States was at war to



the injury of that service and of the United States."

For overt acts it was alleged that certain of the defendants, in the city of Albany, at times specified, made personal solicitations and public speeches, and especially that they published and distributed to certain persons named and other persons to the grand jurors unknown certain pamphlets headed "The Price We pay," a copy of which was annexed to the indictment and made a part of it.

The third count charged that during the same period and on August 26, 1917, the

\*242

United States being at war, etc., \*defendants at the city of Albany, etc., willfully and feloniously made, distributed, and conveyed to certain persons named and others to the grand jurors unknown certain false reports and false statements in certain pamphlets attached to and made a part of the indictment and headed "The Price We Pay," which false statements were in part as shown by certain extracts quoted from the pamphlet, with intent to interfere with the operation and success of the military and naval forces of the United States.

The sixth count charged that at the same place, during the same period and on August 27, 1917, while the United States was at war, etc., defendants willfully and feloniously attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States by means of the publication, circulation, and distribution of "The Price We Pay" to certain persons named and others to the grand jurors unknown.

A general demurrer was overruled, whereupon defendants pleaded not guilty and were put on trial together, with the result that Pierce, Creo, and Zeilman were found guilty upon the first, second, third, and sixth counts, and Nelson upon the third count only. Each defendant was separately sentenced to a term of imprisonment upon each count on which he had been found guilty; the several sentences of Pierce, Creo, and Zeilman, however, to run concurrently.

[1] The present direct writ of error was sued out under section 238, Judicial Code (Comp. St. § 1215), because of contentions that the Selective Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k) and the Espionage Act (40 Stat. 217) were unconstitutional. These have since been set at rest. Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; Schenck v. United States, 249 U. S. 47, 51, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; Debs v. United States, 249 U. S. 211, 215, 39 Sup. Ct. 252, 63 L. Ed. 566. But our jurisdiction continues for the purpose of disposing of other questions raised in the record.

Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

\*243

\*It is insisted that there was error in refusing to sustain the demurrer, and this on the ground that (1) the facts and circumstances upon which the allegation of conspiracy rested were not stated; (2) there was a failure to set forth facts or circumstances showing unlawful motive or intent; (3) there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act; and (4) that the statements contained in the pamphlet were not such as would naturally produce the forbidden consequences.

[2-5] What we have recited of the second count shows a sufficiently definite averment of a conspiracy and overt acts under the provisions of title 1 of the Espionage Act.<sup>1</sup> The fourth section makes criminal a conspiracy "to violate the provisions of sections two or three of this title," provided one or more of

\*244

the conspirators do any act to \*effect the object of the conspiracy. Such a conspiracy, thus attempted to be carried into effect, is none the less punishable because the conspirators fail to agree in advance upon the precise method in which the law shall be violated. It is true the averment of the conspiracy cannot be aided by the allegations respecting the overt acts. United States v. Britton, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698; Joplin Mercantile Co. v. United States, 236 U. S. 531, 536, 35 Sup. Ct. 291, 59 L. Ed. 705. On the other hand, while under section 4 of the Espionage Act, as under section 37 of the Criminal Code (Comp. St. § 10201), a mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be in

<sup>1</sup> Extract from Act June 15, 1917, c. 30, 40 Stat. 217, 219.

Section 3: "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, \* \* \* and whoever, when the United States is at war, shall willfully cause, or attempt to cause, \* \* \* insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct \* \* \* the recruiting or enlistment service of the United States," to the injury of the service or of the United States, "shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

Section 4: "If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine." Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212c, 10212d.

and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. *United States v. Rabinowich*, 238 U. S. 78, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211; *Goldman v. United States*, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410.

[6] As to the second point: Averments that defendants unlawfully, willfully, or feloniously committed the forbidden acts fairly import an unlawful motive; the third count specifically avers such a motive; the conspiracy charged in the second and the willful attempt charged in the sixth necessarily involve unlawful motives.

[7] The third and fourth objections point to no infirmity in the averments of the indictment. Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined, not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer.

Upon the trial, defendants' counsel moved that the jury be directed to acquit the defendants, upon the ground that the evidence was not sufficient to sustain a conviction. Under the exceptions taken to the refusal of this motion it is urged that there was no proof (a) of conspiracy; (b) of criminal purpose or intent; (c) of the falsity of the state-

\*245

ments contained in the pamphlet circulated; (d) of knowledge on defendants' part of such falsity; or (e) of circumstances creating a danger that its circulation would produce the evils which Congress sought to prevent; and further (f) that the pamphlet itself could not legitimately be construed as tending to produce the prohibited consequences.

The pamphlet—"The Price We Pay"—was a highly colored and sensational document, issued by the national office of the Socialist party at Chicago, Ill., and fairly to be construed as a protest against the further prosecution of the war by the United States. It contained much in the way of denunciation of war in general, the pending war in particular; something in the way of assertion that under Socialism things would be better; little or nothing in the way of fact or argument to support the assertion. It is too long to be quoted in full. The following extracts will suffice; those indicated by italics being the same that were set forth in the body of the third count:

"Conscription is upon us; the draft law is a fact!

*"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;*

*"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;*

*"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.*

*"Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.*

*"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.*

*"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.*

\*246

*\* "Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.*

*"And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;*

*"And still the toll of death will grow.*

\* \* \* \* \*

*"The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'*

*"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;*

*"It is the price you pay for your stupidity—you who have rejected Socialism.*

\* \* \* \* \*

*"Food prices go up like skyrocket; and show no sign of bursting and coming down.*

\* \* \* \* \*

*"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.*

\* \* \* \* \*

*"This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;*

*"Get ready for the commercial war that will follow this war."*

*"Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;*

\* \* \* \* \*

\*247

*\* "This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.*

*"But go to it! Believe everything you are told—you always have, and doubtless always will, believe them.*

\* \* \* \* \*

*"For this war—as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the Allied Nations or of the Central Empires have the superior right to exploit undeveloped countries.*

*"It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.*



*"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."*

These expressions were interspersed with suggestions that the war was the result of the rejection of Socialism, and that Socialism was the "salvation of the human race."

It was in evidence that defendants were members of the Socialist party—a party "organized in locals throughout the country"—and affiliated with a local branch in the city of Albany. There was evidence that at a meeting of that branch, held July 11, 1917, at which Pierce was present, the question of distributing "The Price We Pay" was brought up, sample copies obtained from the national organization at Chicago having been produced for examination and consideration; that the pamphlet was discussed, as well as the question of ordering a large number of copies from the national organization for distribution; it was stated that criminal

\*248

proceedings were pending in the United States District Court for the District of Maryland against parties indicted for distributing the same pamphlet; some of the members present, one of them an attorney, advised against its distribution, and a motion was adopted not to distribute it until it was known to be legal. However, some action appears to have been taken towards procuring copies for distribution, for on July 17th a large bundle of them, said to have been 5,000 copies, was delivered at Pierce's house by the literature agent of the Albany local. At a meeting held July 25 the subject was again brought up, it having become known that in the criminal proceedings before mentioned the court had directed a verdict of acquittal; thereupon the resolution of July 11 was rescinded and distributors were called for. On July 29, defendants Pierce, Creo, and Zeilman met at Pierce's house about half past 5 o'clock in the morning, and immediately began distributing the pamphlets in large numbers throughout the city of Albany. Each of them took about 500 copies, and having agreed among themselves about the division of the territory, they went from house to house, leaving a copy upon each doorstep. They repeated this on successive Sundays until August 26, when they were arrested. Nelson acted with them as a distributor on the latter date, and perhaps on one previous occasion.

There was evidence that in some instances a leaflet entitled "Protect Your Rights," and bearing the Chicago address of the National office of the Socialist party, was folded between the pages of the pamphlet. The leaflet was a fervid appeal to the reader to join the Socialist party, upon the ground that it was the only organization that was opposing the war. It declared among other things:

"This organization has opposed war and conscription. It is still opposed to war and conscription. \* \* \* Do you want to help in this struggle? \* \* \* The party needs you now as

\*249

it never needed you before. You \*need the party now as you never needed it before. Men are going to give up their lives for a cause which you are convinced is neither great or noble, will you then begrudge your best efforts to the cause that you feel certain is both great and noble and in which lives the only hope and promise of the future?"

And there was evidence of declarations made by Pierce on the 16th and 17th of August, amounting to an acknowledgment of a treasonable purpose in opposing the draft, which he sought to excuse on the ground that he had "no use for England."

[8-10] It was shown without dispute that defendants distributed the pamphlet—"The Price We Pay"—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution. If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged. Evidently it was intended, as the jury found, to interfere with the conscription and recruitment services; to cause men eligible for the service to evade the draft; to bring home to them, and especially to their parents, sisters, wives, and sweethearts, a sense of impending personal loss, calculated to discourage the young men from entering the service; to arouse suspicion as to whether the chief law officer of the government was not more concerned in enforcing the strictness of military discipline than in protecting the people against improper speculation in their food supply; and

\*250

to produce a belief that our \*participation in the war was the product of sordid and sinister motives, rather than a design to protect the interests and maintain the honor of the United States.

What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. Defendants took the witness stand and severally testified, in effect, that their sole purpose was to gain converts for Socialism, not to interfere with the operation or success of the naval or military forces of the United States. But their evi-



dence was far from conclusive, and the jury very reasonably might find—as evidently they did—that the protestations of innocence were insincere, and that the real purpose of defendants—indeed, the real object of the pamphlet—was to hamper the government in the prosecution of the war.

[11] Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution. *Schenck v. United States*, 249 U. S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470; *Frohwerk v. United States*, 249 U. S. 204, 208, 39 Sup. Ct. 249, 63 L. Ed. 561; *Debs v. United States*, 249 U. S. 211, 215, 39 Sup. Ct. 252, 63 L. Ed. 566.

[12] Concert of action on the part of Pierce, Creo, and Zeilman clearly appeared, and, taken in connection with the nature of the pamphlet and their knowledge of its contents, furnished abundant evidence of a conspiracy and overt acts to sustain their conviction upon the second count.

[13-16] The validity of the conviction upon the third count (the only one that includes Nelson) depends upon whether there was lawful evidence of the falsity of the statements contained in the pamphlet and tending

\*251

to show that, \*knowing they were false, or disregarding their probable falsity, defendants willfully circulated it, with intent to interfere with the operation or success of the military or naval forces of the United States. The criticism of the evidence admitted to show the untruth of the statements about the Attorney General and about J. P. Morgan's loans to the Allies is not well founded; the evidence was admissible; but we hardly see that it was needed to convince a reasonable jury of the falsity of these and other statements contained in the pamphlet. Common knowledge (not to mention the President's address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war [40 Stat. 1], which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false, and such common knowledge went to prove also that defendants knew they were untrue. That they were false if taken in a literal sense hardly is disputed. It is argued that they ought not to be taken literally. But when it is remembered that the pamphlet was intended to be circulated, and so far as defendants acted in the matter was circulated, among readers of all classes and conditions, it cannot be said as matter of law that no considerable number of them would understand the statements in

a literal sense and take them seriously. The jury was warranted in finding the statements false in fact, and known to be so by the defendants, or else distributed recklessly, without effort to ascertain the truth (see *Cooper v. Schlesinger*, 111 U. S. 148, 155, 4 Sup. Ct. 360, 28 L. Ed. 382), and circulated willfully in order to interfere with the success of the forces of the United States. This is sufficient to sustain the conviction of all of the defendants upon the third count.

[17] There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an ac-

\*252

quittal upon any of the counts. The \*question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

[18] It is suggested that the clause of section 3—"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies"—cannot be construed to cover statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge; and that however false the statements and with whatever evil purpose circulated, they are not punishable if accompanied with a pretense of commenting upon them as matters of public concern. We cannot accept such a construction; it unduly restricts the natural meaning of the clause, leaves little for it to operate upon, and disregards the context and the circumstances under which the statute was passed. In effect, it would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false, so long as he did but reiterate what had been said before; while his ignorant dupes, believing his statements and thereby persuaded to obstruct the recruiting or enlistment service, would be punishable by fine or imprisonment under the same section.

Other assignments of error pointing to rulings upon evidence and instructions given or refused to be given to the jury are sufficiently disposed of by what we have said.

The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo, and Zeilman did not exceed that which lawfully might have been imposed under the second, third, or sixth counts, so that the concurrent sentence under the

\*253

first count adds nothing to their punishment. *Claassen v. United States*, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; *Evans v. United States* (two cases) 153 U. S. 584, 595, 608, 14 Sup. Ct. 934, 939, 38 L. Ed. 830, 839;

Putnam v. United States, 162 U. S. 687, 714, 16 Sup. Ct. 923, 40 L. Ed. 1118; Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173.

Judgments affirmed.

Mr. Justice BRANDEIS delivered the following opinion in which Mr. Justice HOLMES concurs:

What is called "distributing literature" is a means commonly used by the Socialist party to increase its membership and otherwise to advance the cause it advocates. To this end the national organization with headquarters at Chicago publishes such "literature" from time to time and sends sample copies to the local organizations. These, when they approve, purchase copies and call upon members to volunteer for service in making the distribution locally. Some time before July 11, 1917, a local of the Socialist party at Albany, New York, received from the national organization sample copies of a four-page leaflet entitled "The Price We Pay," written by Irwin St. John Tucker, an Episcopal clergyman and a man of sufficient prominence to have been included in the 1916-1917 edition of "Who's Who in America." The proposal to distribute this leaflet came up for action at a meeting of the Albany local held on July 11, 1917. A member who was a lawyer called attention to the fact that the question whether it was legal to distribute this leaflet was involved in a case pending in Baltimore in the District Court of the United States; and it was voted "not to distribute 'The Price We Pay' until we know if it is legal." The case referred to was an indictment under the Selective Draft Act for conspiracy to obstruct recruiting by means of distributing the leaflet. Shortly after the July 11th meeting it became known that District Judge Rose had directed an acquittal in that case; and at

\*254

the next meet\*ing of the local, held July 25th, it was voted to rescind the motion "against distributing 'The Price We Pay' and call for distributors." Four members of the local, two of them native Americans, one a naturalized citizen, and the fourth a foreigner who had filed his first naturalization papers, volunteered as distributors. They distributed about 5,000 copies by hand in Albany.

District Judge Rose in directing an acquittal had said of the leaflet in the Baltimore case:

"I do not think there is anything to go to the jury in this case.

"You may have your own opinions about that circular; I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there; but so far as I can see it is principally a circular intended to induce people to subscribe to Socialist newspapers and to get recruits for the Socialist party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may be unpatriotic

at that particular time and place, but it would be going very far indeed, further, I think than any law that I know of would justify, to hold that there has been made out any case here even tending to show that there was an attempt to persuade men not to obey the law."

In New York a different view was taken, and an indictment in six counts was found against the four distributors. Two of the counts were eliminated at the trial. On the other four there were convictions, and on each a sentence of fine and imprisonment. But one of the four counts was abandoned by the government in this court. There remain for consideration count 3, which charges a violation of section 3 of the Espionage Act by making false reports and false statements, with the intent "to interfere with the operation and success of the military and naval forces," and counts 2 and 6, also involving section 3 of the Espionage Act, the

\*255

one for conspiring, the other for at\*tempting, "to cause insubordination, disloyalty and refusal of duty in the military and naval forces." Demurrers to the several counts and motions that a verdict be directed for the several defendants were overruled.

In considering the several counts it is important to note that three classes of offenses are included in section 3 of the Espionage Act and that the essentials of liability under them differ materially. The first class, under which count 3 is drawn, is the offense of making or conveying false statements or reports with intent to interfere with the operations or success of the military and naval forces. The second, involved in counts 2 and 6 is that of attempting to cause insubordination, disloyalty, mutiny, or refusal of duty. With the third, that of obstructing the recruiting and enlistment service, we have, since the abandonment of the first count, no concern here. Although the uttering or publishing of the words charged be admitted, there necessarily arises in every case—whether the offense charged be of the first class or of the second—the question whether the words were used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (Schenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249 [63 L. Ed. 470]), and also the question whether the act of uttering or publishing was done willfully, that is, with the intent to produce the result which the Congress sought to prevent. But in cases of the first class three additional elements of the crime must be established, namely:

(1) The statement or report must be of something capable of being proved false in fact. The expression of an opinion, for instance, whether sound or unsound, might conceivably afford a sufficient basis for the charge of attempting to cause insubordina-



tion, disloyalty or refusal of duty, or for the charge of obstructing recruiting; but, because an opinion is not capable of being

\*256

proved \*false in fact, a statement of it cannot be made the basis of a prosecution of the first class.

(2) The statement or report must be proved to be false.

(3) The statement or report must be known by the defendant to be false when made or conveyed.

In the case at bar the alleged offense consists wholly in distributing leaflets which had been written and published by others. The fact of distribution is admitted. But every other element of the two classes of crime charged must be established in order to justify conviction. With unimportant exceptions to be discussed later, the only evidence introduced to establish the several elements of both of the crimes charged is the leaflet itself; and the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect. In order to determine whether the leaflet furnishes any evidence to establish any of the above enumerated elements of the offenses charged the whole leaflet must necessarily be read. It is as follows:

#### THE PRICE WE PAY.

By Irwin St. John Tucker.

##### I.

Conscription is upon us; the draft law is a fact!

Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;

Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

Into that seething, heaving swamp of torn  
flesh and \*floating entrails they will be plunged,  
in regiments, divisions and armies, screaming  
as they go.

\*257

Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

And still the toll of death will grow.

Let them come! Let death and desolation make barren every Home! Let the agony of war crack every parent heart! Let the horrors

and miseries of the world-downfall swamp the happiness of every hearthstone!

Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!

##### II.

Yesterday I saw moving pictures of the Battle of the Somme. A company of Highlanders was shown, young and handsome in their kilts and brass helmets and bright plaid.

They laughed and joked as they stood on the screen in their ranks at ease, waiting the command to advance.

The camera shows rank after rank, standing strong and erect, smoking and chaining with one another;

Then it shows a sign: "Less than 20 per cent. of these soldiers were alive at the close of the day."

Only one in five remained of all those laddies, when sunset came, the rest were crumpled masses of carrion under their torn plaid.

Many a highland home will wail and crouch  
for many a \*year, because of these crumpled  
masses of carrion, wrapped in their plaid, upon  
a far French hillside.

\*258

I saw a regiment of Germans charging downhill against machine gunfire. They melted away like snowflakes falling into hot water.

The hospital camps were shown, with hundreds and thousands of wounded men in all stages of pain and suffering, herded like animals, milling around like cattle in the slaughter pens.

All the horror and agony of war were exhibited; and at the end a flag was thrown on the screen and a proclamation said: "Enlist for your Country!" The applause was very thin and scattering; and as we went out, most of the men shook their heads and said:

"That's a hell of a poor recruiting scheme!"

For the men of this land have been fed full with horror during the past three years; and tho the call for volunteers has become wild, frantic, desperate; tho the posters scream from every billboard, and tho parades and red fire inflame the atmosphere in every town;

The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say "Must we—be that!"

You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

It is the price you pay for your stupidity—you who have rejected Socialism.

##### III.

Food prices go up like skyrocket; and show no sign of bursting and coming down.

Wheat, corn, potatoes, are far above the Civil War mark; eggs, butter, meat—all these things are almost beyond a poor family's reach.

\*259

\*The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

Starvation begins to stare us in the face—and we, people of the richest and most productive land on earth are told to starve ourselves yet further because our allies must be fed.



Submarines are steadily sending to the fishes millions of tons of food stuffs; and still we build more ships, and send more food, and more and more is sunk;

Frantically we grub in the earth and sow and tend and reap; and then as frantically load the food in ships, and then as frantically sink with them—

We, the "civilized nations" of the world!

While the children of the poor clamor for their bread and the well to do shake their heads and wonder what on earth the poor folks are doing;

The poor folks are growling and muttering with savage sidelong glances, and are rolling up their sleeves.

For the price they pay for their stupidity is getting beyond their power to pay!

#### IV.

Frightful reports are being made of the ravages of venereal diseases in the army training camps, and in the barracks where the girl munition workers live.

One of the great nations lost more men thru loathsome immoral diseases than on the firing line, during the first 18 months of the war.

Back from the Mexican border our boys come, spreading the curse of the great Black Plague among hundreds of thousands of homes; blasting the lives of innocent women and unborn babes,

Over in Europe ten millions of women are deprived of their husbands, and fifty millions of babies can never be;

#### \*260

\*Of those women who will have their mates given back to them, there are twenty millions who will have ruined wrecks of men; mentally deranged, physically broken, morally rotten;

Future generations of families are made impossible; blackness and desolation instead of happiness and love will reign where the homes of the future should be;

And all because you believed the silly lie, that "Socialism would destroy the home!"

Pound on, guns of the embattled host; wreck yet more homes, kill yet more husbands and fathers, rob yet more maidens of their sweethearts, yet more babies of their fathers;

That is the price the world pays for believing the monstrous, damnable outrageous lie that Socialism would destroy the home!

Now the homes of the world are being destroyed; every one of them would have been saved by Socialism. But you would not believe. Now pay the price!

#### V.

This war, you say, is all caused by the Kaiser; and we are fighting for democracy against autocracy. Once dethrone the Kaiser and there will be permanent peace.

That is what they said about Napoleon. And in the century since Napoleon was overthrown there has been more and greater wars than the world ever saw before.

There were wars before Germany ever existed; before Rome ruled; before Egypt dominated the ages.

War has been universal; and the cause of war is always the same. Somebody wanted something somebody else possessed and they fought over the ownership of it.

This war began over commercial routes and

ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

#### \*261

\*"Get ready for the commercial war that will follow this war."

Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

And as soon as the guns are stilled and the dead are buried, commercial forces will prepare for the next bloody struggle over routes and ports and rights, coal mines and railroads;

For these are the essence of this, as of all other wars!

This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

But go to it! Believe everything you are told—you always have and doubtless always will, believe them.

Only do retain this much reason; when you have paid the price, the last and uttermost price; and have not received what you were told you were fighting for—namely Democracy—

Then remember that the price you paid was not the purchase price for justice, but the penalty price for your stupidity!

#### VI.

We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely killing.

Every man, every woman, every child, must "do his bit" in the service of destruction.

We have been telling you for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity but you have laughed at us.

Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of

#### \*262

killing; and you \*have turned the whole energy of the nations of the world into the service of their kings for the purpose of killing—killing—killing.

Why would you not believe us when we told you that it was possible to cooperate for the saving of life?

Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder?

Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellowworkers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

—Lo, the price you pay! Lo, the price your children will pay. Lo, the agony, the death, the blood, the unforgettable sorrow,—

The price of your stupidity!

For this war—as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the cham-

bers of commerce of the Allied Nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked.

Socialism would have settled that question; it would determine that to every producer shall be given all the value of what he produces; so that nothing would be left over for exploiters or investors.

\*263

\*With that great question settled there would be no cause for war.

Until the question of surplus profits is settled that way, wars will continue; each war being the prelude to a still vaster and greater outburst of hell;

Until the world becomes weary of paying the stupendous price for its own folly;

Until those who are sent out to maim and murder one another for the profit of bankers and investors determine to have and to hold what they have fought for;

Until money is no more sacred than human blood;

Until human life refuses to sacrifice itself for private gain;

Until by the explosion of millions of tons of dynamite the stupidity of the human race is blown away, and Socialism is known for what it is, the salvation of the human race;

Until—you will keep on paying the price!  
IF THIS INTERESTS YOU. PASS IT ON.

\* \* \* \* \*

Subscribe to The American Socialist, published weekly by the National Office, Socialist Party, 803 West Madison Street, Chicago, Ill., 50 cents per year, 25 cents for 6 months. It is a paper without a muzzle.

\* \* \* \* \*

Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

\* \* \* \* \*

To the National Office, Socialist Party, 803 W. Madison St., Chicago, Ill.

I am interested in the Socialist Party and its principles. Please send me samples of its literature.

Name.....

Address.....

City.....State.....

First. From this leaflet, which is divided in-

\*264

to six chapters, there are set forth, in count 3, five sentences as constituting the false statements or reports willfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(a) Two sentences are culled from the first chapter. They follow immediately after the words, "Conscription is upon us; the draft law is a fact," and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military

age and impress them into the army. \* \* \* And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the government gravely called as a witness a major in the regular army with 28 years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system and that the word "impress" has no place in the recruiting service. The subject of his testimony was a matter, not of fact, but of law, and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise," had been assumed by the Circuit Court of Appeals for that circuit in *Masses Publishing Co. v. Patten*, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999 (decided 11 days before this testimony was given), and was later expressly held by this court in *Schenck v. United States*, 249 U. S. 47, 53, 39 Sup. Ct. 247, 63 L. Ed. 470. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was

\*265

later verified.<sup>2</sup> That the prediction made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(b) The fourth sentence set forth in the third count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the government called the United States attorney for that district, who testified that no federal law makes it a crime not to stand up when the "Star Spangled Banner" is played and that he has no knowledge of any one being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the government, is presumed to do his duty, and not to violate his duty,

<sup>2</sup> On May 20, 1918 (40 Stat. 557, c. 79 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044n-2044q]), Congress, by joint resolution extended the draft to males who had since June 5, 1917, attained the age of twenty-one and authorized the President to extend it to those thereafter attaining that age. Under this act June 5, 1918, was fixed as the date for the second registration. Subsequently August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. 40 Stat. 1834, 40 Stat. 1781. By Act Aug. 31, 1918, c. 166, 40 Stat. 955, the provisions of the draft law were extended to persons between the ages of 18 and 45. Under this act, September 12, 1918, was fixed as the date for the third registration, 40 Stat. 1840.



and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place those present, whether in uniform or in civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout

\*266

the war. \*There was no federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was therefore not engaged in sending men to prison for that offense. But, when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. Act August 10, 1917, c. 53, 40 Stat. 276 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½gr). Such criticism of governmental operations, though grossly unfair as an interpretation of facts or even wholly unfounded in fact, are not "false reports and false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count 3 as a false statement, was culled from the sixth chapter of the leaflet and is this:

"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German government. 40 Stat. 1, c. 1. This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True, it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law, and which is sometimes spoken of as a finding of ultimate fact, as distinguished from an evidentiary fact. But in its essence it is the expression of a

\*267

judgment—like the \*statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 104, 23 Sup. Ct. 33, 37 (47 L. Ed. 90), is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a

fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretence or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many co-operating causes, many different conditions, acts and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimizes both prejudice and other sources of error; for individuals, and classes of individuals, attach significance to those things which are significant to them, and, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis, so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man; another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolu-

\*268

tion of April 6, \*1917, did not do so for the reasons assigned by the President in his address to Congress on April 2, is demonstrated by the discussions in the House and in the Senate.<sup>3</sup> That debate discloses, also, that both in the Senate and in the House the loans to the Allies and the desire to insure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of the war.<sup>4</sup>

<sup>3</sup> See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

<sup>4</sup> Discussion in the Senate April 4, 1917:

"\* \* \* There is no doubt in any mind but the enormous amount of money loaned to the Allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every debt bond worth a hundred cents on the dollar and making the payment of every debt certain and sure." 55 Cong. Rec. p. 213.

Discussion in the House April 5, 1917.

"Since the loan of \$500,000,000, was made by Morgan to the Allies their efforts have been persistent to land our soldiers in the French trenches." 55 Cong. Rec. p. 342.

"Already we have loaned the Allies, through our banking system, up to December 31, 1916, the enormous sum of \$2,325,900,000 in formal loans. Other huge sums have been loaned and billions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No



\*269

However strongly we may believe \*that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the nation should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact to be determined by a jury upon or without evidence, and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defense of privilege might have been interposed. *Gandia v. Pettingill*, 222 U. S. 452, 32 Sup. Ct. 127, 56 L. Ed. 267. There is no reason to believe that Congress, in prohibiting a special class of false statements intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet unaffected by any extrinsic evidence the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental.

\*270

\*There is nothing in the act compelling or indeed justifying such a construction of it,

wonder the Morgans and the munition makers desire war. \* \* \* Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." 55 Cong. Rec. 362.

"I believe that all Americans, except that limited, although influential, class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." 55 Cong. Rec. 386.

"Likewise, Mr. Chairman, the J. Pierpont Morgans, and their associates, who have floated war loans running into the millions which they now want the United States to guarantee by entering the European war. \* \* \*" 55 Cong. Rec. 372.

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply faster in the fumes about the munition factories. You will not find many in our climate. They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." 55 Cong. Rec. p. 376.

and I cannot believe that Congress in passing, and the President in approving it, conceived that such a construction was possible.

Second. But even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributors of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer even of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle, and sinister influence in the important decisions of our government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President and repeated in the New Freedom that:

"The masters of the government of the United States are the combined capitalists and manufacturers of the United \*States." \*

\*271

We may be convinced that the decision to enter the great war was wholly free from such base influences, but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants knew that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pam-

\* Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

phlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism, and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger," that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of willfully conveying in time of war false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist party, performed as distributors of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under

\*272

the third count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third. To sustain a conviction on the second or on the sixth count it is necessary to prove that by cooperating to distribute the leaflet the defendants conspired or attempted willfully to "cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as

to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counseling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offenses. Certainly there was no clear and present danger that such would be

\*273

the result. \*The leaflet was not even distributed among those in the military or the naval service. It was distributed among civilians; and since the conviction on the first count has been abandoned here by the government, we have no occasion to consider whether the leaflet might have discouraged voluntary enlistment or obedience to the provisions of the Selective Draft Act.

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "The Price We Pay."

## MEMORANDUM DECISIONS

## DISPOSED OF IN VACATION

(250 U. S. 679)

No. 315. **CHAMPAIGN COUNTY v. PEOPLE OF STATE OF ILLINOIS** ex rel. **CITY OF CHAMPAIGN**, et al. August 21, 1919. Error to the Supreme Court of the State of Illinois. For opinion below, see *People ex rel. v.*

*Champaign County*, 286 Ill. 363, 121 N. E. 635. Mr. Donald C. Dobbins, of Champaign, Ill., for plaintiff in error. Mr. Fred B. Hamill, of Champaign, Ill., for defendants in error. Dismissed with costs, pursuant to the twenty-eighth rule.

## DISPOSED OF AT OCTOBER TERM, 1919

(251 U. S. 543)

No. 152. **EVANSVILLE & BOWLING GREEN PACKET COMPANY**, plaintiff in error, v. **M. M. LOGAN** et al., etc. Jan. 26, 1920. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 180 Ky. 216, 202 S. W. 492. Mr. Malcolm Yeaman, of Henderson, Ky., for plaintiff in error.

**PER CURIAM**. Dismissed for want of jurisdiction, upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 544)

No. 176. **V. & S. BOTTLE COMPANY**, plaintiff in error, v. **MOUNTAIN GAS COMPANY**. Jan. 26, 1920. In error to the Supreme Court of the State of Pennsylvania. For opinion below, see 261 Pa. 523, 104 Atl. 667. Mr. C. La Rue Munson, of Williamsport, Pa., for plaintiff in error. Mr. Samuel S. Mehard, of Pittsburgh, Pa., for defendant in error.

**PER CURIAM**. Dismissed for want of jurisdiction, upon the authority of *California Powder Works v. Davis*, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; *Sayward v. Denny*, 158 U. S. 180, 183, 15 Sup. Ct. 777, 39 L. Ed. 941; *Harding v. Illinois*, 196 U. S. 78, 80, 25 Sup. Ct. 176, 49 L. Ed. 394; *Seaboard Air Line v. Duvall*, 225 U. S. 477, 481, 487, 32 Sup. Ct. 790, 56 L. Ed. 1171; *Cleveland & Pittsburgh R. R. Co. v. Cleveland*, 235 U. S. 50, 53, 35 Sup. Ct. 21, 59 L. Ed. 127.

(251 U. S. 544)

No. 180. **SUPERIOR & PITTSBURGH COPPER COMPANY**, plaintiff in error, v. **Steve DAVIDOVICH**, sometimes known as **Steve DAVIS**. Jan. 26, 1920. In error to the Supreme Court of the State of Arizona. For opinion below see 19 Ariz. 402, 171 Pac. 127. Mr. Cleon T. Knapp, of Bisbee, Ariz., for plaintiff in error. Mr. Samuel Herrick, of Washington, D. C., for defendant in error.

**PER CURIAM**. Affirmed upon the authority of *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058.

(251 U. S. 545)

No. 181. **Gertrude Minnie JONES**, plaintiff in error, v. **Max HILTSCHER**. Jan. 26, 1920. In error to the Supreme Court of the State of New Mexico. For opinion below, see 23 N. M.

674, 170 Pac. 884. Mr. W. Martin Jones, Jr., of Rochester, N. Y., for plaintiff in error. Messrs. Edward D. Tittmann, of Hillsboro, N. M., and Charles T. Tittmann, of Washington, D. C., for defendant in error.

**PER CURIAM**. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 545)

No. 189. **The BALTIMORE & OHIO RAILROAD COMPANY**, plaintiff in error, v. **John S. COFFLAND**. Jan. 26, 1920. In error to the Court of Appeals, Harrison County, Seventh Appellate District of the State of Ohio. Mr. D. A. Hollingsworth, of Cadiz, Ohio, for plaintiff in error. Mr. Ernest Sidney McNamee, of Cadiz, Ohio, for defendant in error.

**PER CURIAM**. Dismissed for want of jurisdiction upon the authority of (1) *Schlosser v. Hemphill*, 198 U. S. 173, 175, 25 Sup. Ct. 654, 49 L. Ed. 1000; *Louisiana Nav. Co. v. Oyster Commission of Louisiana*, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; *Gray's Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 255, 37 Sup. Ct. 295, 61 L. Ed. 702; *Bruce v. Tobin*, 245 U. S. 18, 19, 38 Sup. Ct. 7, 62 L. Ed. 123; (2) section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 566)

No. 193. **SEABOARD AIR LINE RAILWAY COMPANY**, petitioner, v. **J. J. GRAY**. Jan. 26, 1920. On writ of certiorari to the Supreme Court of the State of South Carolina. For opinion below, see 102 S. E. 512. See, also, 248 U. S. 557, 39 Sup. Ct. 19, 63 L. Ed. 420. Mr. Jo-Berry S. Lyles, of Columbia, S. C., for petitioner. Messrs. Fred H. Dominick, of Newberry, S. C., and Wallace D. Conner, of Brunson, S. C., for respondent. Dismissed per stipulation.

(251 U. S. 567)

No. 194. **James A. KEOWN**, petitioner, v. **Mary E. KEOWN**, et al. Jan. 26, 1920. On writ of certiorari to the Superior Court of the State of Massachusetts. For opinion below, see 230 Mass. 313, 119 N. E. 785. Mr. James A. Keown, of Lynn, Mass., in pro. per. Dismissed for want of prosecution.



(251 U. S. 567)

No. 195. OHIO STATE TELEPHONE COMPANY, plaintiff in error, v. CITY OF COLUMBUS, Ohio. Jan. 26, 1920. In Error to the Supreme Court of the State of Ohio. For opinion below, see 98 Ohio St. 454, 121 N. E. 902. Mr. Clarence Brown, of Toledo, Ohio, for plaintiff in error. Mr. Henry L. Scarlett, of Columbus, Ohio, for defendant in error. Dismissed with costs, pursuant to the sixteenth rule, on motion of Mr. Frederick S. Tyler in behalf of counsel for the defendant in error.

(251 U. S. 549)

No. 628. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, petitioner, v. McCaull-Dinsmore Company. Jan. 26, 1920. For opinion below, see 260 Fed. 835, which affirms (D. C.) 252 Fed. 664. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(251 U. S. 549)

No. 638. The WESTERN UNION TELEGRAPH COMPANY, petitioner, v. Eugene E. Southwick. Jan. 26, 1920. For opinion below, see 214 S. W. 987. Petition for a writ of certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas granted.

(251 U. S. 559)

No. 647. ATLANTA TERMINAL COMPANY, petitioner, v. The UNITED STATES of America. Jan. 26, 1920. For opinion below, see 260 Fed. 779. Messrs. Mark Bolding, Arthur Heyman and Albert Howell, Jr., all of Atlanta, Ga., for petitioner. Mr. William L. Frierson, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 550)

No. 655. The YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al., petitioners, v. NICHOLS & COMPANY. Jan. 26, 1920. For opinion below, see 83 South. 5. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted.

(251 U. S. 560)

No. 658. James G. WILSON, trustee, etc., petitioner, v. A. J. BENHAM et al. Jan. 26, 1920. For opinion below, see 261 Fed. 62. Messrs. James G. Wilson and George B. Guthrie, both of Portland, Or., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 560)

No. 666. Marie EQUI, petitioner, v. The UNITED STATES of America. Jan. 26, 1920. For opinion below, see 261 Fed. 53. Messrs. Austin Lewis, of San Francisco, Cal., and James E. Fenton and C. E. S. Wood, both of Portland, Or., for petitioner. Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(251 U. S. 560)

No. 675. Edwin REITZ, petitioner, v. The UNITED STATES of America. Jan. 26, 1920. For opinion below, see 257 Fed. 731. Mr. L. W. Crofoot, of Aberdeen, S. D. (Messrs. L. T. Van Slyke, of Aberdeen, S. D., and N. B. Bartlett, of Sioux Falls, S. D., of counsel), for petitioner. Messrs. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 206. Frank P. CHESBROUGH, plaintiff in error, v. Mary L. HOTCHKISS et al. Jan. 27, 1920. See, also, Chesbrough v. Woodworth, 251 Fed. 881, 164 C. C. A. 97. Mr. Thomas A. E. Weadock, of Detroit, Mich., for plaintiff in error. Mr. Edward S. Clark, of Bay City, Mich., for defendants in error. Death of Mary Schreiber, formerly Mary L. Hotchkiss, one of the defendants in error herein, suggested, and appearance of Northern Trust Company, executor of the last will of Mary Schreiber, deceased, as a party defendant in error, filed and entered, on motion of Mr. E. S. Clark for the defendant in error.

(251 U. S. 567)

No. 216. EVERGLADES DRAINAGE LEAGUE et al., appellants, v. NAPOLEON B. BROWARD DRAINAGE DISTRICT et al. Jan. 30, 1920. Appeal from the District Court of the United States for the Southern District of Florida. For opinion below, see 253 Fed. 246. Mr. Clair D. Vallette, of Washington, D. C., for appellants. Dismissed with costs on motion of counsel for the appellants.

(251 U. S. 546)

No. —. Original. Ex parte In the matter of J. E. BROUSSARD et al., petitioners. Feb. 2, 1920. Motion for leave to file petition for writ of mandamus herein denied.

(251 U. S. 545)

No. 596. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY et al., plaintiffs in error, v. The City and County of DENVER. Feb. 2, 1920. In error to the Supreme Court of the State of Colorado. For opinion below, see 184 Pac. 604. Messrs. Milton Smith, W. H. Ferguson, and Charles R. Brock, all of Denver, Colo. (Elmer L. Brock, of Denver, Colo., of counsel), for plaintiffs in error. Messrs. James A. Marsh and Norton Montgomery, both of Denver, Colo., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction, on the authority of City of Pawhuska v. Pawhuska Oil & Gas Company, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054. See City of Chicago v. Dempsey, 250 U. S. 651, 40 Sup. Ct. 53, 63 L. Ed. 1189, decided November 10, 1919.

(251 U. S. 560)

No. 640. J. E. BROUSSARD et al., petitioners, v. Walter J. CRAWFORD, trustee. Feb. 2, 1920. For opinion below, see 260 Fed. 122. Messrs. Sol. E. Gordon, of Beaumont, Tex., and

A. D. Lipscomb, of Hempstead, Tex., for petitioners. Messrs. Horace Chilton, of Dallas, Tex., E. R. Spotts, of Houston, Tex., and U. F. Short, of Dallas, Tex., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 561)

No. 662. The CONTINENTAL BANK OF NEW YORK, petitioner, v. Ezra P. PRENTICE, trustee, etc. Feb. 2, 1920. For opinion below, see 261 Fed. 858. Mr. S. K. Lichtenstein, of New York City (Myron L. Lesser, of New York City, of counsel), for petitioner. Messrs. Rosenberg & Ball, of New York City (Messrs. James N. Rosenberg and George G. Ernst, both of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(251 U. S. 561)

No. 665. Lucian C. LAUGHTER, petitioner, v. The UNITED STATES of America. Feb. 2, 1920. For opinion below, see 261 Fed. 68. Mr.

Theodore Mack, of Fort Worth, Tex., for petitioner. Mr. William L. Frierson, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 561)

No. 669. GULF & SHIP ISLAND RAILROAD COMPANY et al., plaintiffs in error, v. Carl BOONE, Robert Boone, et al., etc. Feb. 2, 1920. For opinion below, see 82 South. 335. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

(251 U. S. 561)

No. 670. A. J. PARTAN et al., petitioners, v. The UNITED STATES of America. Feb. 2, 1920. For opinion below, see 261 Fed. 515. Messrs. Thomas Mannix, of Portland, Or., and Austin Lewis, of San Francisco, Cal., for petitioners. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(252 U. S. 37)

SHAFFER v. CARTER, State Auditor, et al.  
(two cases).(Argued December 11 and 12, 1919. Decided  
March 1, 1920.)

Nos. 531, 580.

**1. APPEAL AND ERROR** ⇨74—REFUSAL OF IN-  
JUNCTION MERGED IN DECREE AND NOT AP-  
PEALABLE.

Where, on application for an interlocutory injunction, the injunction was refused, and a decree entered dismissing the suit, the denial of the interlocutory application was merged in the final decree, and was not appealable.

**2. TAXATION** ⇨608(9)—SUIT MAY BE MAIN-  
TAINED TO RESTRAIN ENFORCEMENT OF TAX  
FOR WHICH LIEN IS ASSERTED IN ABSENCE OF  
REMEDY AT LAW.

A suit may be maintained to restrain enforcement of a tax, on allegations that the asserted lien for the amount of the tax creates a cloud on the title to property, unless there is a plain, adequate, and complete remedy at law.

**3. TAXATION** ⇨608(9)—STATE LAW HELD TO  
PROVIDE NO LEGAL REMEDY PREVENTING RE-  
SORT TO EQUITY TO RESTRAIN ENFORCEMENT  
OF TAX.

The laws of Oklahoma provide no legal remedy preventing resort to equity for removal of a cloud on the title caused by an invalid lien imposed for a tax valid in itself, and hence a suit may be maintained to restrain enforcement of the tax, on the ground that the procedure to enforce it, by imposing a lien, denies due process, though the tax be valid.

**4. TAXATION** ⇨611(7)—EQUITY, HAVING JU-  
RISDICTION OF SUIT TO RESTRAIN ENFORCE-  
MENT OF TAX, WILL DISPOSE OF ALL QUES-  
TIONS RAISED.

A suit to restrain the enforcement of a state income tax being properly brought in equity, because of the complaint that the procedure for enforcing the tax by imposing a lien is invalid, though the tax be valid, the jurisdiction extends to the disposition of all questions raised by the bill.

**5. TAXATION** ⇨2—JURISDICTION TO TAX DE-  
PENDS ON POWER TO ENFORCE MANDATE, AND  
REMAINS THOUGH ALL PERMISSIBLE MEAS-  
URES NOT RESORTED TO.

Governmental jurisdiction in matters of taxation depends upon the power to enforce the mandate of the state by action taken within its borders, either in personam or in rem, according to the circumstances of the case, and the jurisdiction to act remains, even though all permissible measures are not resorted to.

**6. TAXATION** ⇨20—STATE MAY IMPOSE TAX  
ON INCOME OF NONRESIDENTS ACCRUING  
WITHIN STATE.

A state may impose a tax on the incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment so far as it can by the exercise of a just control over persons and property within its borders, and the

Oklahoma Income Tax Law is not invalid for want of jurisdiction to impose the tax.

**7. CONSTITUTIONAL LAW** ⇨207(4)—SCOPE OF  
PROTECTION TO NONRESIDENTS FROM STATE  
TAXATION STATED.

Const. art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, does not entitle citizens of other states to entire immunity from taxation, nor to preferential treatment as compared with resident citizens, but only protects them against discriminatory taxation.

**8. TAXATION** ⇨37—VALIDITY OF STATE TAX-  
ING LAW UNDER FEDERAL CONSTITUTION DE-  
PENDS ON PRACTICAL OPERATION.

When the question is whether a state taxing law contravenes rights secured by the federal Constitution, the decision does not depend upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.

**9. TAXATION** ⇨104—STATE NOT DEPRIVED OF  
POWER TO TAX INCOME OF NONRESIDENT BY  
HIS EXERCISE OF SKILL AND MANAGEMENT IN  
ANOTHER STATE.

That it required the personal skill and management of a nonresident of Oklahoma to produce the income from his property in Oklahoma, and that his management was exerted from his place of business in another state, did not deprive the state of Oklahoma of jurisdiction to tax the income which arose within its own borders.

**10. CONSTITUTIONAL LAW** ⇨207(4)—CITIZENS  
OF STATE MAY CARRY ON BUSINESS IN AN-  
OTHER STATE WITHOUT BEING SUBJECTED TO  
MORE ONEROUS TAXES THAN ARE IMPOSED ON  
RESIDENT CITIZENS.

One of the rights secured by Const. art. 4, § 2, is that of a citizen of one state to remove to and carry on business in another, without being subjected in property or person to taxes more onerous than the citizens of the latter state are subjected to.

**11. CONSTITUTIONAL LAW** ⇨207(4) — STATE  
INCOME TAX LAW NOT INVALID AS IMPOSING  
MORE ONEROUS TAXES ON CITIZENS OF OTHER  
STATES THAN ON ITS OWN CITIZENS.

The Oklahoma Income Tax Law does not violate Const. U. S. art. 4, § 2, by imposing a greater burden on citizens of other states deriving income from property and business within the state than are imposed on resident citizens.

**12. CONSTITUTIONAL LAW** ⇨207(4), 229(1)—  
STATE INCOME TAX LAW NOT DISCRIMINA-  
TORY WITH REFERENCE TO DEDUCTION OF  
LOSSES FROM GROSS INCOME.

The Oklahoma Income Tax Law does not deny nonresidents the privileges and immunities to which they are entitled and the equal protection of the laws, in that it permits residents to deduct from their gross income losses incurred within or without the state, while nonresidents may deduct only those incurred within the state; nonresidents being taxed only on their income from sources within the state, while res-



idents are taxed on their income from all sources.

13. COMMERCE ⇨72—STATE TAX ON INCOME OF NONRESIDENT ENGAGED IN INTERSTATE COMMERCE NOT INVALID.

The Oklahoma Income Tax Law does not constitute a burden on interstate commerce, as applied to a nonresident deriving an income from the operation of oil and gas properties, the products of which are shipped in interstate commerce.

14. COURTS ⇨366(6)—WHETHER PAYMENT OF PRODUCTION TAX RELIEVES FROM PAYMENT OF INCOME TAX A QUESTION OF STATE LAW.

Whether the payment of a tax by producers of oil or natural gas under the Oklahoma Gross Production Tax Law, as amended by Laws 1916, c. 39, relieves the producer from the payment of the income tax imposed by Laws 1915, c. 164, is a question of state law.

15. TAXATION ⇨58—PRODUCTION TAX HELD NOT TO RELIEVE TAXPAYER FROM PAYMENT OF INCOME TAX.

Laws Okl. 1915, c. 107, as amended by Laws Okl. 1916, c. 39, imposing a production tax on oil and natural gas in lieu of all taxes on land, leases, mining rights, etc., is a substitute only for the ad valorem property tax, and not for the income tax imposed by Laws 1915, c. 164.

16. CONSTITUTIONAL LAW ⇨207(4), 229(1)—TAXATION ⇨47(7)—IMPOSITION OF TAX ON INCOME OF PERSONS PAYING PRODUCTION TAX NOT UNCONSTITUTIONAL.

Even though the Oklahoma income tax constitutes double taxation as applied to producers of oil and natural gas paying a gross production tax, it does not violate the federal Constitution or the Fourteenth Amendment for that reason, as they do not prohibit double taxation, or other forms of unequal taxation, so long as the inequality is not based upon arbitrary distinctions.

17. CONSTITUTIONAL LAW ⇨283—STATE INCOME TAX LAW IMPOSING LIEN FOR NONPAYMENT DOES NOT DENY DUE PROCESS OF LAW.

The Oklahoma Income Tax Law does not deny due process of law because of the provision of section 11, imposing a lien on the property of delinquent taxpayers, without limiting the lien to the property producing the income, as applied to a nonresident deriving income from the operation of oil and gas properties managed as one business subsequent to the taking effect of the law.

Mr. Justice McReynolds dissenting.

Appeals from the District Court of the United States for the Eastern District of Oklahoma.

Suit by Charles B. Shaffer against Frank C. Carter, State Auditor, and another. From the refusal of a temporary injunction, and from a decree dismissing the suit, plaintiff appeals. Decree affirmed, and appeal from the refusal of the injunction dismissed.

Mr. Malcolm E. Rosser, of Muskogee, Okl., for appellant.

Messrs. C. W. King and S. P. Freeling, both of Oklahoma City, Okl., for appellees.

\*43

\*Mr. Justice PITNEY delivered the opinion of the Court.

These are two appeals, taken under circumstances that will be explained, from a single decree in a suit in equity brought by appellant to restrain the enforcement of a tax assessed against him for the year 1916 under the Income Tax Law of the state of Oklahoma (Laws 1915, c. 107) on the ground of the unconstitutionality of the statute.

A previous suit having the same object was brought by him in the same court against the officials then in office, in which an application for an interlocutory injunction heard before three judges pursuant to section 266, Judicial Code, was denied; one Judge dissenting. *Shaffer v. Howard* (D. C.) 250 Fed. 873. An appeal was taken to this court, but, pending its determination, the terms of office of the defendants expired,

\*44

and, there being no law of the state authorizing a revival or continuance of the action against their successors, we reversed the decree and remanded the cause, with directions to dismiss the bill for want of proper parties. 249 U. S. 200, 39 Sup. Ct. 255, 63 L. Ed. 559.

[1] After such dismissal the present defendant Carter, as state auditor, issued another tax warrant and delivered it to defendant Bruce, sheriff of Creek county, with instructions to levy upon and sell plaintiff's property in that county in order to collect the tax in question; and the sheriff having threatened to proceed, this suit was commenced. An application for an interlocutory injunction, heard before three judges, was denied upon the authority of the decision in 250 Fed. and of certain recent decisions of this court. The decree as entered not only disposed of the application but dismissed the action. Plaintiff, apparently unaware of this, appealed to this court under section 266, Judicial Code, from the refusal of the temporary injunction. Shortly afterwards he took an appeal under section 238, Judicial Code (Comp. St. § 1215) from the same decree as a final decree dismissing the action. The latter appeal is in accord with correct practice, since the denial of the interlocutory application was merged in the final decree. The first appeal (No. 531) will be dismissed.

The Constitution of Oklahoma, besides providing for the annual taxation of all property in the state upon an ad valorem basis, authorizes (article 10, § 12) the employment of a variety of other means for raising revenue, among them income taxes.

The act in question is chapter 164 of the Laws of 1915. Its first section reads as follows:

"Each and every person in this state, shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade

\*45

or profession carried on in this \*state by persons residing elsewhere."

Subsequent sections define what the term "income" shall include; prescribe how net income shall be computed; provide for certain deductions; prescribe varying rates of tax for all taxable incomes in excess of \$3,000, this amount being deducted (by way of exemption) from the income of each individual, and for one living with spouse an additional \$1,000, with further deductions where there are children or dependents, exemptions being the same for residents and nonresidents; require (section 2) a return on or before March 1st from each person liable for an income tax under the provisions of the act for the preceding calendar year; provide (section 9) that the state auditor shall revise returns and hear and determine complaints, with power to correct and adjust the assessment of income; that (section 10) taxes shall become delinquent if not paid on or before the 1st day of July, and the state auditor shall have power to issue to any sheriff of the state a warrant commanding him to levy the amount upon the personal property of the delinquent party; and (by section 11):

"If any of the taxes herein levied become delinquent, they shall become a lien on all the property, personal and real, of the delinquent person, and shall be subject to the same penalties and provisions as are all ad valorem taxes."

Plaintiff, a nonresident of Oklahoma, being a citizen of Illinois and a resident of Chicago, in that state, was at the time of the commencement of the suit and for several years theretofore (including the years 1915 and 1916) engaged in the oil business in Oklahoma, having purchased, owned, developed and operated a number of oil and gas mining leases, and being the owner in fee of certain oil-producing land, in that state. From properties thus owned and operated during the year 1916 he received a net income exceeding \$1,500,000, and of this he made, under protest, a return which showed

\*46

that, \*at the rates fixed by the act, there was due to the state an income tax in excess of \$76,000. The then state auditor overruled the protest and assessed a tax in accordance with the return; the present auditor has put it in due course of collection; and plaintiff resists its enforcement upon the ground that the act, in so far as it subjects the incomes of nonresidents to the payment of such a tax, takes their property without due process of law and denies to them the equal protection of the laws, in contravention of section 1 of the Fourteenth Amendment, burdens in-

terstate commerce, in contravention of the commerce clause of section 8 of article 1 of the Constitution, and discriminates against nonresidents in favor of residents, and thus deprives plaintiff and other nonresidents of the privileges and immunities of citizens and residents of the state of Oklahoma, in violation of section 2 of article 4. He also insists that the lien attempted to be imposed upon his property pursuant to section 11 for taxes assessed upon income not arising out of the same property would deprive him of property without due process of law.

[2] As ground for resorting to equity, the bill alleges that plaintiff is the owner of various oil and gas mining leases covering lands in Creek county, Okl., and that the lien asserted thereon by virtue of the levy and tax warrant creates a cloud upon his title. This entitles him to bring suit in equity (*Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 348, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Ogden City v. Armstrong*, 168 U. S. 224, 237, 18 Sup. Ct. 98, 42 L. Ed. 444; *Ohio Tax Cases*, 232 U. S. 576, 587, 34 Sup. Ct. 372, 58 L. Ed. 737; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88), unless the contention that he has a plain, adequate, and complete remedy at law be well founded.

This contention is based, first, upon the provision of section 9 of chapter 164, giving to the state auditor the same power to correct and adjust an assessment of income that is given to the county board of equalization in

\*47

cases of ad \*valorem assessments, taken in connection with chapter 107 of the Laws of 1915, which provides (article 1, subd. B, § 2) for an appeal from that board to the district court of the county. In a recent decision (*Berryhill v. Carter*, 185 Pac. 93), the Supreme Court of the state held that an aggrieved income taxpayer may have an appeal under this section, and that thus "all matters complained of may be reviewed and adjusted to the extent that justice may demand." But the case related to "correcting and adjusting an income tax return," and the decision merely established the appeal to the district court as the appropriate remedy, rather than an application to the Supreme Court for a writ of certiorari. It falls short of indicating—to say nothing of plainly showing—that this procedure would afford an adequate remedy to a party contending that the income tax law itself was repugnant to the Constitution of the United States.

Secondly, reference is made to section 7 of subdivision B, art. 1, c. 107, Laws Okl. 1915, wherein it is provided that where illegality of a tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person on paying the tax may give notice to the officer collecting it, stating the grounds of complaint and that



suit will be brought against him; whereupon it is made the duty of such officer to hold the tax until the final determination of such suit if brought within 30 days, and if it be determined that the tax was illegally collected, the officer is to repay the amount found to be in excess of the legal and correct amount. But this section is one of several that have particular reference to the procedure for collecting ad valorem taxes; and they are prefaced by this statement (page 176):

"Subdivision B. To the existing provisions of law relating to the ad valorem or direct system of taxation the following provisions are added."

\*48

Upon this ground, in *Gipsy Oil Co. v. Howard* and companion suits brought by certain oil-producing companies to restrain enforcement of taxes authorized by the gross production tax law (Sess. Laws 1916, p. 102), upon the ground that they were an unlawful imposition upon federal instrumentalities, the United States District Court for the Western District of Oklahoma held that the legal remedy provided in section 7 of chapter 107 applied only to ad valorem taxes, and did not constitute a bar to equitable relief against the production taxes. Defendants appealed to this court, and assigned this ruling for error, inter alia; but they did not press the point, and the decrees were affirmed upon the merits of the federal question. *Howard v. Gipsy Oil Co.*, 247 U. S. 503, 38 Sup. Ct. 426, 62 L. Ed. 1239.

[3, 4] We deem it unnecessary to pursue further the question whether either of the statutory provisions referred to furnishes an adequate legal remedy against income taxes assessed under an unconstitutional law, since one of the grounds of complaint in the present case is that, even if the tax itself be valid, the procedure prescribed by section 11 of the Income Tax Law for enforcing such a tax by imposing a lien upon the taxpayer's entire property, as threatened to be put into effect against plaintiff's property for taxes not assessed against the property itself and not confined to the income that proceeded from the same property, is not "due process of law," within the requirement of the Fourteenth Amendment. For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there appears to be no legal remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since a court of equity does not "do justice by halves," and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. *Camp v. Boyd*, 229 U. S. 530, 551, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317; *McGowan v. Parish*, 237 U. S. 285, 296, 35 Sup. Ct. 543, 59 L. Ed. 955.

\*49

\*This brings us to the merits.

Under the "due process of law" provision appellant makes two contentions: First, that

the state is without jurisdiction to levy a tax upon the income of nonresidents; and, secondly, that the lien is invalid because imposed upon all his property real and personal, without regard to its relation to the production of his income.

[5] These are separate questions, and will be so treated. The tax might be valid, although the measures adopted for enforcing it were not. Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either in personam or in rem according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise, or the like; and the jurisdiction to act remains even though all permissible measures be not resorted to. *Michigan Trust Co. v. Perry*, 228 U. S. 346, 353, 33 Sup. Ct. 550, 57 L. Ed. 867; *Ex parte Indiana Transportation Co.*, 244 U. S. 456, 457, 37 Sup. Ct. 717, 61 L. Ed. 1253.

It will be convenient to postpone the question of the lien until all questions as to the validity of the tax have been disposed of.

[6] The contention that a state is without jurisdiction to impose a tax upon the income of nonresidents, while raised in the present case, was more emphasized in *Travis, Comptroller, v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. —, decided this day, involving the Income Tax Law of the state of New York (Laws 1919, c. 627). There it was contended, in substance, that while a state may tax the property of a non-resident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its Constitution and laws and the protection they receive from the state, yet a nonresident although conducting a business or car-

\*50

rying on an occupation there, cannot \*be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against nonresidents, is not only not a property tax, but is not an excise or privilege tax, since no privilege is granted; the right of the noncitizen to carry on his business or occupation in the taxing state being derived, it is said, from the provisions of the federal Constitution.

This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable



forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree

\*51

but not the \*fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the federal Constitution. Laws N. Y. 1778, c. 17; Report of Oliver Wolcott, Jr., Secretary of the Treasury, to 4th Cong. 2d Sess. (1796), concerning Direct Taxes; American State Papers, 1 Finance, 423, 427, 429, 437, 439.

The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, while denying their power to impose a tax upon any of the operations of the federal government, Mr. Chief Justice Marshall, speaking for the court, conceded (4 Wheat. 428, 429, 4 L. Ed. 579) that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction, saying:

"It is obvious, that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation," etc.

In *Michigan Central Railroad v. Powers*, 201 U. S. 245, 292, 293, 26 Sup. Ct. 459, 462 (50 L. Ed. 744), the court, by Mr. Justice Brewer, said:

"We have had frequent occasion to consider questions of state taxation in the light of the

federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the

\*52

freedom of a sovereign both as to ob\*jects and methods."

That a state may tax callings and occupations as well as persons and property has long been recognized.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. \* \* \* It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, (21 L. Ed. 179).

See, also, *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. Ed. 347; *Armour & Co. v. Virginia*, 246 U. S. 1, 6, 38 Sup. Ct. 267, 62 L. Ed. 547; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 463, 39 Sup. Ct. 522, 63 L. Ed. 1084.

And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents (*New Orleans v. Stempel*, 175 U. S. 309, 320, et seq., 20 Sup. Ct. 110, 44 L. Ed. 174; *Bristol v. Washington County*, 177 U. S. 133, 145, 20 Sup. Ct. 585, 44 L. Ed. 701; *Liverpool, etc., Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903), and sustaining federal taxation of the income of an alien nonresident derived from securities held in this country (*De Ganay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042).

[7] That a state, consistently with the federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own

\*53

\*citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or busi-

ness in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Section 2 of article 4 of the Constitution entitles him to the privilege and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449.

Oklahoma has assumed no power to tax nonresidents with respect to income derived from property or business beyond the borders of the state. The first section of the act, while imposing a tax upon inhabitants with respect to their entire net income arising from all sources, confines the tax upon nonresidents to their net income from property owned and business, etc., carried on within the state. A similar distinction has been observed in our federal income tax laws from one of the earliest down to the present.<sup>1</sup> The acts of 1861 (12 Stat. 309) and 1864 (13

Stat. \*281, 417) confined the tax to persons residing in the United States and citizens residing abroad. But in 1866 (14 Stat. 137, 138) there was inserted by amendment the following:

"And a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, not citizens thereof."

Similar provisions were embodied in the acts of 1870 (16 Stat. 257) and 1894 (28 Stat. 553); and in the act of 1913 (38 Stat. 166), after a clause imposing a tax upon the entire net income arising or accruing from all sources (with exceptions not material here) to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States though not a citizen thereof, the following appears:

"And a like tax shall be assessed, levied, collected, and paid annually upon the entire net

income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

Evidently this furnished the model for section 1 of the Oklahoma statute.

No doubt is suggested (the former requirement of apportionment having been removed by constitutional amendment) as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein, even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the Fourteenth Amendment imposes no greater restriction in this regard upon the several states than the corresponding clause of the Fifth Amendment imposes upon the United States.

[8] It is insisted, however, both by appellant in this case and by the opponents of the New York law in *Travis, Comptroller, v. Yale & Towne Mfg. Co.*, that an income tax is in its nature a personal tax, or a "subjective tax imposing personal liability upon the recipient of the income," and that as to a

\*55  
\*nonresident the state has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed. *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 463, 39 Sup. Ct. 522, 63 L. Ed. 1084. The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen.

[9] The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another state, did not deprive Oklahoma of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the state within which the income actually arises and whose authority over it operates in rem. At most, there might be a question whether the value of the service of management rendered from without the state

<sup>1</sup> Acts of August 5, 1861 (chapter 45, § 49, 12 Stat. 292, 309); June 30, 1864 (chapter 173, § 116, 13 Stat. 223, 281); July 4, 1864 (Joint Res. 77, 13 Stat. 417); July 13, 1866 (chapter 184, § 9, 14 Stat. 98, 137, 133); March 2, 1867 (chapter 169, § 13, 14 Stat. 471, 477, 478); July 14, 1870 (chapter 255, § 6, 16 Stat. 256, 257); August 27, 1894 (chapter 349, § 27, 28 Stat. 509, 553); October 3, 1913 (chapter 16, § II, A. subd. 1, 38 Stat. 114, 166); September 8, 1916 (chapter 463, title I, part. I, § 1a, 39 Stat. 756 [Comp. St. § 6336a]); October 3, 1917 (chapter 63, title I, §§ 1 and 2, 40 Stat. 300 [Comp. St. §§ 6336aa, 6336aaa]); February 24, 1919 (chapter 18, §§ 210, 213(c), 40 Stat. 1057, 1062, 1066 [Comp. St. Ann. Supp. 1919, §§ 6336½e, 6336½f]).



ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case, hence we express no opinion upon it.

The contention that the act deprives appellant and others similarly circumstanced of the privileges and immunities enjoyed by residents and citizens of the state of Oklahoma, in violation of section 2 of article 4

\*56

of the Constitu<sup>\*tion</sup>, is based upon two grounds, which are relied upon as showing also a violation of the "equal protection" clause of the Fourteenth Amendment.

[10,11] One of the rights intended to be secured by the former provision is that a citizen of one state may remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter state are subjected to. *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Maxwell v. Bugbee*, 250 U. S. 525, 537, 40 Sup. Ct. 2, 63 L. Ed. 1124. The judge who dissented in *Shaffer v. Howard* (D. C.) 250 Fed. 873, 883, concluded that the Oklahoma Income Tax Law offended in this regard, upon the ground (page 888) that since the tax is as to citizens of Oklahoma a purely personal tax measured by their incomes, while as applied to a nonresident it is "essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected," there was a discrimination against the nonresident. We are unable to accept this reasoning. It errs in paying too much regard to theoretical distinctions and too little to the practical effect and operation of the respective taxes as levied; in failing to observe that in effect citizens and residents of the state are subjected at least to the same burden as nonresidents, and perhaps to a greater, since the tax imposed upon the former includes all income derived from their property and business within the state and, in addition, any income they may derive from outside sources.

[12] Appellant contends that there is a denial to noncitizens of the privileges and immunities to which they are entitled, and also a denial of the equal protection of the laws, in that the act permits residents to deduct from their gross income not only losses incurred within the state of Oklahoma but also those sustained outside of that state, while nonresidents may deduct only those

\*57

incurred within the \*state. The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to

them a corresponding privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. It may be remarked, in passing, that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question.

[13] It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295; but only upon the net proceeds, and is plainly sustainable, even if it includes net gains from interstate commerce. *U. S. Glue C. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748. Compare *Peck & Co. v. Lowe*, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049.

[14-16] Reference is made to the gross production tax law of 1915 (chapter 107, art. 2, subd. A, § 1, Sess. Laws 1915, p. 151), as amended by chapter 39 of Sess. Laws 1916 (page 106), under which every person or corporation engaged in producing oil or natural gas within the state is required to pay a tax equal to 3 per centum of the gross value of such product in lieu of all taxes imposed by the state, counties, or municipalities upon the land or the leases, mining

\*58

rights, \*and privileges, and the machinery, appliances, and equipment, pertaining to such production. It is contended that payment of the gross production tax relieves the producer from the payment of the income tax. This is a question of state law, upon which no controlling decision by the Supreme Court of the state is cited. We overrule the contention, deeming it clear, as a matter of construction, that the gross production tax was intended as a substitute for the ad valorem property tax but not for the income tax, and that there is no such repugnance between it and the income tax as to produce a repeal by implication. Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the states from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based up



on arbitrary distinctions. *St. Louis S. W. Railway v. Arkansas*, 235 U. S. 350, 367-368, 35 Sup. Ct. 99, 59 L. Ed. 265.

[17] The contention that there is a want of due process in the proceedings for enforcement of the tax, especially in the lien imposed by section 11 upon all of the delinquent's property, real and personal, reduces itself to this: that the state is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for an income tax may not be imposed upon a nonresident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it.

But the facts of the case do not raise this question. It clearly appears from the averments of the bill that the whole of plaintiff's property in the state of Oklahoma consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas; and that, begin-

\*59

ning at least as early as the year 1915, \*when the act was passed, and continuing without interruption until the time of the commencement of the suit (April 16, 1919), he was engaged in the business of developing and operating these properties for the production of oil, his entire business in that and other states was managed as one business, and his entire net income in the state for the year 1916 was derived from that business. Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed. The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction in rem; and we are clear that the state acted within its lawful power in treating his property interests and business as having both unity and continuity. Its purpose to impose income taxes was declared in its own Constitution, and the precise nature of the tax and the measures to be taken for enforcing it were plainly set forth in the act of 1915; and plaintiff having thereafter proceeded, with notice of this law, to manage the property and conduct the business out of which proceeded the income now taxed, the state did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution

or other appropriate process, upon all property employed in the business.

No. 531: Appeal dismissed.

No. 580: Decree affirmed.

Mr. Justice McREYNOLDS dissents.

(252 U. S. 60)

TRAVIS, Comptroller of State of New York,  
v. YALE & TOWNE MFG. CO.

(Argued Dec. 15 and 16, 1919. Decided March 1, 1920.)

No. 548.

1. CONSTITUTIONAL LAW ¶283—STATE MAY TAX INCOMES OF NONRESIDENTS ARISING WITHIN THE STATE.

A state may, without violating the due process provision of the Fourteenth Amendment, impose a tax on the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment, so far as it can by exercise of a just control over persons and property within the state, as by garnishment of credits.

2. CONSTITUTIONAL LAW ¶207(4)—NONRESIDENTS NOT DISCRIMINATED AGAINST BY STATE INCOME TAX LAW CONFINING DEDUCTIONS TO EXPENSES CONNECTED WITH INCOME RECEIVED WITHIN THE STATE.

There is no unconstitutional discrimination against citizens of other states by the provision of Income Tax Law N. Y. § 360, which confines the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state.

3. CONSTITUTIONAL LAW ¶207(4)—INCOME TAX LAW, REQUIRING TAX TO BE WITHHELD AT SOURCE IN CASE OF NONRESIDENTS, NOT DISCRIMINATORY.

No unconstitutional discrimination against nonresident citizens arises from the provision of Income Tax Law N. Y. § 366, confining the withholding of the tax at the source to the income of nonresidents, as this in no way increases the burden of the tax on nonresidents.

4. CORPORATIONS ¶641—INCOME TAX LAW REQUIRING WITHHOLDING OF TAX BY EMPLOYER A REASONABLE REGULATION OF FOREIGN CORPORATION'S BUSINESS.

The New York Income Tax Law, so far as it requires a Connecticut corporation employing nonresidents within the state to withhold the tax on their salary, is not an unreasonable regulation of the conduct of its business in New York, in the absence of any contract limiting the state's power of regulation, though it might be more convenient to it to pay such salaries in Connecticut.

5. CONSTITUTIONAL LAW ¶154(2)—STATE INCOME TAX LAW NOT INVALID AS IMPAIRING THE OBLIGATION OF CONTRACTS BETWEEN EMPLOYER AND EMPLOYÉ.

The New York Income Tax Law does not, by requiring a Connecticut corporation employ-

ing nonresidents within the state to withhold the tax on their salaries, impair the obligation of the contracts between it and its employes, where no contract made before its passage required the wages or salaries to be paid in Connecticut, or contained other provisions conflicting with such requirement.

**6. CONSTITUTIONAL LAW** ¶207(4)—**STATE INCOME TAX LAW INVALID IN GRANTING EXEMPTIONS TO "RESIDENTS" DENIED TO NONRESIDENTS; "CITIZEN."**

The New York Income Tax Law violates Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, by granting to residents a personal exemption of \$1,000 in the case of single persons, etc., which is denied to nonresidents, notwithstanding the distinction between the terms "residents" and "citizens."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen; Resident.]

**7. CONSTITUTIONAL LAW** ¶229(2)—**DISCRIMINATION AGAINST NONRESIDENTS BY STATE INCOME TAX LAW NOT REMOVED BY EXCLUDING CERTAIN SOURCES OF INCOME OF NONRESIDENT.**

The discrimination against citizens of other states under the New York Income Tax Law, arising from the granting of exemptions to residents which are denied to nonresidents, is not counterbalanced by the provision of section 359, par. 3, excluding from the income of nonresidents annuities and interest on bank deposits, bonds, notes, or other interest-bearing obligations, and dividends from corporations, except to the extent to which they are a part of the income from any business, trade, profession, or occupation carried on in the state.

**8. CONSTITUTIONAL LAW** ¶207(4)—**VALIDITY OF STATUTE DISCRIMINATING AGAINST NONRESIDENTS DEPENDS ON EXISTING CONDITIONS.**

The validity of the New York Income Tax Law, which discriminates against nonresidents by denying to them exemptions granted to residents, must be determined with respect to its effect and operation in the existing situation, without speculating as to the possibility that states whose citizens are discriminated against will enact similar laws.

**9. CONSTITUTIONAL LAW** ¶207(4)—**DISCRIMINATION AGAINST CITIZENS OF ADJOINING STATES NOT CURED BY RETALIATORY DISCRIMINATION.**

A discrimination by a state against citizens of adjoining states in imposing an income tax would not be cured, if those states established like discriminations against the citizens of the state in question.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Yale & Towne Manufacturing Company against Eugene M. Travis, as Comptroller of the State of New York.

From a final decree in favor of complainant (262 Fed. 576), defendant appeals. Affirmed.

Messrs. James S. Y. Ivins, of Albany, N. Y., and Jerome L. Cheney, First Deputy Atty. Gen., for appellant.

Messrs. Louis H. Porter and Archibald Cox, both of New York City, for appellee.

\*72

\*Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity, brought in the District Court by appellee against appellant as comptroller of the state of New York to obtain an injunction restraining the enforcement of the Income Tax Law of that state (chapter 627, Laws 1919) as against complainant, upon the ground of its repugnance to the Constitution of the United States because violating the interstate commerce clause, impairing the obligation of contracts, depriving citizens of the states of Connecticut and New Jersey employed by complainant of the privileges and immunities enjoyed by citizens of the state of New York, depriving complainant

\*73

and its nonresident employes of their \*property without due process of law, and denying to such employes the equal protection of the laws. A motion to dismiss the bill—equivalent to a demurrer—was denied upon the ground that the act violated section 2 of article 4 of the Constitution by discriminating against nonresidents in the exemptions allowed from taxable income; an answer was filed, raising no question of fact; in due course there was a final decree in favor of complainant; and defendant took an appeal to this court under section 238, Judicial Code (Comp. St. § 1215).

The act (section 351) imposes an annual tax upon every resident of the state with respect to his net income as defined in the act, at specified rates, and provides also:

"A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

Section 359 defines gross income, and contains this paragraph:

"3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession, or occupation carried on in this state subject to taxation under this article."

In section 360 provision is made for deducting in the computation of net income



expenses, taxes, losses, depreciation charges, etc.; but, by paragraph 11 of the same section:

"In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state. \* \* \*"

\*74

By \*section 362, certain exemptions are allowed to any resident individual taxpayer, viz. in the case of a single person a personal exemption of \$1,000, in the case of the head of a family or a married person living with husband or wife, \$2,000, and \$200 additional for each dependent person under 18 years of age or mentally or physically defective. The next section reads as follows:

"Sec. 363. *Credit for Taxes in Case of Taxpayers Other Than Residents of the State.*—Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws."

Section 366 in terms requires that every "withholding agent" (including employers) shall deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equals or exceeds \$1,000 in the year, and shall pay the tax to the comptroller. This applies to a resident employé, also, unless he files a certificate showing his residence address within the state.

Complainant, a Connecticut corporation doing business in New York and elsewhere, has employés who are residents, some of Connecticut, others of New Jersey, but are occupied in whole or in part in complainant's business in New York. Many of them have annual salaries or fixed compensation exceed-

\*75

ing \$1,000 per year, and the \*amount required by the act to be withheld by complainant from the salaries of such nonresident employés is in excess of \$3,000 per year. Most of these persons are engaged under term contracts calling for stipulated wages or salaries for a specified period.

The bill sets up that defendant, as comptroller of the state of New York, threatens to enforce the provisions of the statute against complainant, requires it to deduct and withhold from the salaries and wages payable to its employés residing in Connecticut or New Jersey and citizens of those

states respectively, engaged in whole or in part in complainant's business in the state of New York, the taxes provided in the statute, and threatens to enforce against complainant the penalties provided by the act if it fails to do so; that the act is unconstitutional for the reasons above specified; and that, if complainant does withhold the taxes as required, it will be subjected to many actions by its employés for reimbursement of the sums so withheld. No question is made about complainant's right to resort to equity for relief; hence we come at once to the constitutional questions.

[1, 2] That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in *Shaffer v. Carter*, State Auditor, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. —, this day announced, involving the Income Tax Law of the state of Oklahoma. That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident tax-

\*76

payers, to such as are \*connected with income arising from sources within the taxing state, likewise is settled by that decision.

It is not here asserted that the tax is a burden upon interstate commerce; the point having been abandoned in this court.

[3] The contention that an unconstitutional discrimination against noncitizens arises out of the provision of section 366 confining the withholding at source to the income of nonresidents is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it. See *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 239, 10 Sup. Ct. 533, 33 L. Ed. 892.

[4] Nor has complainant on its own account any just ground of complaint by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfill the duty of deducting and withholding the tax. This cannot be deemed an unreasonable regulation of its conduct of business in New York. *Erie Railroad v. Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 846, cited in behalf of complainant, is not in point. In that case the state of Pennsylvania grant-



ed to a railroad company organized under the laws of New York and having its principal place of business in that state the right to construct a portion of its road through Pennsylvania, upon prescribed terms which were assented to and complied with by the company and were deemed to constitute a contract, not subject to impairment or modification through subsequent legislation by the state of Pennsylvania except to the extent of establishing reasonable regulations touching the management of the business done and the property owned by the company in that state, not materially interfering with or obstructing the substantial enjoyment of the rights previously granted. Afterwards, Pennsylvania undertook by stat-

\*77

ute to re\*quire the company, when making payments of coupons upon bonds previously issued by it, payable at its office in the city of New York, to withhold taxes assessed by the state of Pennsylvania against residents of that state because of ownership of such bonds. The coupons were payable to bearer, and when they were presented for payment it was practically impossible for the company to ascertain who were the real owners, or whether they were owned by the same parties who owned the bonds. The statute was held to be an unreasonable regulation and hence to amount to an impairment of the obligation of the contract.

[5] In the case at bar complainant, although it is a Connecticut corporation and has its principal place of business in that state, is exercising the privilege of carrying on business in the state of New York without any contract limiting the state's power of regulation. The taxes required to be withheld are payable with respect to that portion only of the salaries of its employes which is earned within the state of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation. It is true complainant asserts that the act impairs the obligation of contracts between it and its employes; but there is no averment that any such contract made before the passage of the act required the wages or salaries to be paid in the state of Connecticut, or contained other provisions in any wise conflicting with the requirement of withholding.

[6] The District Court, not passing upon the above questions, held that the act, in granting to residents exemptions denied to nonresidents, violated the provision of section 2 of article 4 of the federal Constitution:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

\*78

And, notwithstanding the elaborate and ingenious argument submitted by appellant to the contrary, we are constrained to affirm the ruling.

The purpose of the provision came under consideration in *Paul v. Virginia*, 8 Wall. 168, 180 (19 L. Ed. 357), where the court, speaking by Mr. Justice Field, said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

And in *Ward v. Maryland*, 12 Wall. 418, 430 (20 L. Ed. 449), holding a discriminatory state tax upon nonresident traders to be void, the court, by Mr. Justice Clifford, said:

"Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Of course the terms "resident" and "citizen" are not synonymous, and in some cases

\*79

the distinction is important (\**La Tourette v. McMaster*, 248 U. S. 465, 470, 39 Sup. Ct. 160, 63 L. Ed. 362); but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In *Blake v. McClung*, 172 U. S. 239, 247, 19 Sup. Ct. 165, 43 L. Ed. 432, and 176 U. S. 59, 67, 20 Sup. Ct. 307, 44 L. Ed. 371, the court held that a statute of Tennessee, declaring the terms upon which a foreign corporation might carry on business and hold property in that state, which gave to its creditors residing in Tennessee priority over all creditors residing elsewhere, without special reference to whether they were citizens or not, must

be regarded as contravening the "privileges and immunities" clause.

The nature and effect of the crucial discrimination in the present case are manifest. Section 362, in the case of residents, exempts from taxation \$1,000 of the income of a single person, \$2,000 in the case of a married person, and \$200 additional for each dependent. A nonresident taxpayer has no similar exemption; but by section 363, if liable to an income tax in his own state, including income derived from sources within New York and subject to taxation under this act, he is entitled to a credit upon the income tax otherwise payable to the state of New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state:

"Provided, that such credit shall be allowed only if the laws of said state \* \* \* grant a substantially similar credit to residents of this state subject to income tax under such laws."<sup>1</sup>

\*S0

\*In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which states has an income tax law. A considerable number of complainant's employes, residents and citizens of one or the other of those states, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring states, many thousands of men and women, residents and citizens of those states, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the state of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first \$1,000 or \$2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference.

<sup>1</sup> Reading the statute literally, there would appear to be an additional discrimination against non-residents, in that under section 366 the "withholding agent" (employer) is required to withhold 2 per cent. from all salaries, wages, etc., payable to any individual nonresident amounting to \$1,000 or more in the year; whereas by section 351 the tax upon residents (indeed, upon nonresidents likewise, so far as this section goes) is only 1 per centum upon the first \$10,000 of net income. It is said, however, that the discrepancy arose through an amendment made to section 351 while the bill was pending in the Legislature; no corresponding amendment having been made in section 366. In view of this, and taking the whole of the act, together, the Attorney General has advised the comptroller that section 366 requires withholding of only 1 per centum upon the first \$10,000 of income; and the comptroller has issued regulations to that effect. Hence we treat the discrepancy as if it did not exist.

Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag*

\*S1

*\*Savings Bank v. Purdy*, 231 U. S. 373, 393–394, 34 Sup. Ct. 114, 58 L. Ed. 274; *Maxwell v. Bugbee*, 250 U. S. 525, 543, 40 Sup. Ct. 2, 63 L. Ed. 1124); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring states, and favoring all residents including those who are citizens of the taxing state.

[7] It cannot be deemed to be counterbalanced by the provision of paragraph 3 of section 359, which excludes from the income of nonresident taxpayers—

"annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

This provision is not so conditioned as probably to benefit nonresidents to a degree corresponding to the discrimination against them; it seems to have been designed rather (as is avowed in appellant's brief) to preserve the pre-eminence of New York City as a financial center.

Nor can the discrimination be upheld, as is attempted to be done, upon the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of that state are exempt from taxation under this act. The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that nonresidents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them.

[8, 9] In the brief submitted by the Attorney General of New York in behalf of appellant, it is said that the framers of the act, in embodying in it the provision for unequal treatment of the residents of other states

\*S2

with \*respect to the exemptions, looked forward to the speedy adoption of an income tax by the adjoining states, in which event injustice to their citizens on the part of New York could be avoided by providing similar exemptions similarly conditioned. This, however, is wholly speculative; New York has no authority to legislate for the adjoining states; and we must pass upon its



statute with respect to its effect and operation in the existing situation. But besides, in view of the provisions of the Constitution of the United States, a discrimination by the state of New York against the citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York. A state may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other states. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Decree affirmed.

Mr. Justice McREYNOLDS concurs in the result.

(251 U. S. 519)

SOUTH COAST S. S. CO. v. RUDBACH.

THE SOUTH COAST.

(Submitted Nov. 10, 1919. Decided March 1, 1920.)

No. 68.

MARITIME LIENS —28— FURNISHER OF SUPPLIES IN DOMESTIC PORT ENTITLED TO LIEN UNDER CHARTER, THOUGH WARNED NOT TO FURNISH THEM ON VESSEL'S CREDIT.

Where a charter party required the charterer to save the owner harmless from liens, and authorized the owner to retake the vessel if liens were not discharged within 30 days, thus recognizing that liens might be imposed by the charterer, one furnishing supplies in a domestic port was entitled to a lien, under Act June 23, 1910, §§ 1, 3 (Comp. St. §§ 7783, 7785), though warned by representatives of the owner not to furnish the supplies on the vessel's credit.

Mr. Justice McKenna, Mr. Justice Pitney, and Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Libel by J. C. Rudbach against the Steamer South Coast; the South Coast Steamship Company, claimant. A decree for the libellant (233 Fed. 327) was affirmed by the Circuit Court of Appeals for the Ninth Circuit (247 Fed. 84, 159 C. C. A. 302), and the claimant brings certiorari. Affirmed.

Mr. Oliver Dibble, of San Francisco, Cal., for petitioner.

Mr. S. Hasket Derby, of San Francisco, Cal., for respondent.

\*522

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a libel against the Steamer South Coast, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered representatives of the owner in San Pedro warned the libellant that the steamer was under charter and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case because by the terms of the charter the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning it had done so. Both courts however held that the charter gave the master power to create the lien. 233 Fed. 327; 247 Fed. 84, 159 C. C. A. 302.

\*523

\*By the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. § 7783), a maritime lien is given for such supplies and by section 3 (Comp. St. § 7785) a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, or for any other reason, the person ordering the necessities was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a



lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Decree affirmed.

Mr. Justice McKENNA, Mr. Justice PITNEY, and Mr. Justice CLARKE dissent.

(252 U. S. 126)

CHAPMAN et al. v. WINTROATH.

(Argued Jan. 9, 1920. Decided March 1, 1920.)

No. 117.

1. PATENTS ⇐109 — APPLICANT HAS TWO YEARS TO CLAIM INVENTION COVERED BY LATER PATENT.

Under Rev. St. § 4886, as amended by Act March 3, 1897, § 1 (Comp. St. § 9430), and in view of section 4887, as amended by Act March 3, 1903, § 1 (Comp. St. § 9431), and sections 4897, 4920, 4904 (Comp. St. §§ 9443, 9466, 9449), one whose patent application discloses, but does not claim, an invention which conflicts with that of a later patent, has two years in which to file a divisional application, in order to have the question of priority of invention determined, notwithstanding section 4894 (Comp. St. § 9438), as to abandonment of the application by failure to prosecute for one year.

2. PATENTS ⇐109—APPLICANT'S RIGHTS NOT AFFECTED BY DELAY, WHEN STATUTES AND RULES COMPLIED WITH.

Where a patent application is prosecuted strictly as required by the statutes and rules of the Patent Office, the applicant's rights may not be diminished or denied on the ground that delay in connection therewith may have been prejudicial to either public or private interests.

Mr. Justice McReynolds dissenting.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Interference proceeding between Mathew T. Chapman and another and John A. Wintroath. A decision of the Commissioner of Patents was reversed (47 App. D. C. 428), and the Chapmans bring certiorari. Reversed.

Messrs. John L. Jackson and Albert H. Adams, both of Chicago, Ill., and A. V. Cushman, of Washington, D. C., for petitioners.

Mr. Paul Synnestvedt, of Philadelphia, Pa., for respondent.

\*132

\*Mr. Justice CLARKE delivered the opinion of the Court.

In 1909 Mathew T. Chapman and Mark C. Chapman filed an application for a patent on an "improvement in deep well pumps."

The mechanism involved was complicated, the specification intricate and long, and the claims numbered 34. The application met with unusual difficulties in the Patent Office, and, although it had been regularly prosecuted, as required by law and the rules of the Office, it was still pending without having been passed to patent in 1915, when the controversy in this case arose.

In 1912 John A. Wintroath filed an application for a patent on "new and useful improvements in well mechanism," which was also elaborate and intricate, with 12 combination claims, but a patent was issued upon it on November 25, 1913.

Almost 20 months later, on June 6, 1915, the Chapmans filed a divisional application, in which the claims of the Wintroath patent were copied and on this application such proceedings were had in the Patent Office that on March 24, 1916, an interference was declared between it and the Wintroath patent.

The interference proceeding related to the combination of a fluid-operated bearing supporting a downwardly extending shaft, and auxiliary bearing means for sustaining any resultant downward or upward thrust of such shaft. It is sufficiently described in count 3 of the notice of interference:

\*133

\*"3. In deep well pumping mechanism, the combination with pump means including a pump casing located beneath the surface of the earth and rotary impeller means in said casing, of a downwardly extending power shaft driven from above and adapted to drive said impeller means, a fluid operated bearing co-operating to support said shaft, said fluid operated bearing being located substantially at the top of said shaft so that the shaft depends from the fluid bearing and by its own weight tends to draw itself into a substantially straight vertical line, means for supplying fluid under pressure to said fluid bearing independently of the action of the pump means, auxiliary bearing means for sustaining any resultant downward thrust of said power shaft and auxiliary bearing means for sustaining any resultant upward thrust of said power shaft."

Wintroath admits that the invention thus in issue was clearly disclosed in the parent application of the Chapmans, but he contends that their divisional application, claiming the discovery, should be denied, because of their delay of nearly 20 months in filing, after the publication of his patent and the Chapmans, while asserting that their parent application fully disclosed the invention involved, admit that the combination of the Wintroath patent was not specifically claimed in it.

Pursuant to notice and the rules of the Patent Office, Wintroath, on April 27, 1916, filed a statement declaring that he conceived the invention contained in the claims of his

patent "on or about the 1st of October, 1910," and thereupon, because this date was subsequent to the Chapman filing date, March 10, 1909, the Examiner of Interferences notified him that judgment on the record would be entered against him unless he showed cause within 30 days why such action should not be taken.

Within the rule day Wintroath filed a motion for judgment in his favor "on the record," claiming that conduct on the part of the Chapmans was shown, which estopped

\*134

\*them from making the claims involved in the interference and which amounted to an abandonment of any rights in respect thereto which they may once have had. The Chapmans contended that such a motion for judgment could not properly be allowed "until an opportunity had been granted for the introduction of evidence." But the Examiner of Interferences, without hearing evidence, entered judgment on the record in favor of Wintroath, and awarded priority to him, on the ground that the failure of the Chapmans to make claims corresponding to the interference issue for more than one year after the date of the patent to Wintroath, constituted equitable laches which estopped them from successfully making such claims. This holding, based on the earlier decision by the Court of Appeals in *Rowntree v. Sloan*, 45 App. D. C. 207, was affirmed by the Examiner in Chief, but was reversed by the Commissioner of Patents, whose decision, in turn, was reversed by the Court of Appeals in the judgment which we are reviewing.

In its decision the Court of Appeals holds that an inventor whose parent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, may file a second application making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, but only within one year from the date of the patent, and that longer delay in filing constitutes equitable laches, which bars the later application. By this holding the court substitutes a one-year rule for a two-year rule which had prevailed in the Patent Office for many years before the *Rowntree* decision, rendered in 1916, and the principal reason given for this important change is that the second application should be regarded as substantially an amendment to the parent application, and that it would be inequitable to permit a longer time for filing it than the

\*135

one year allowed by R. S. \*§ 4894 (Comp. St. § 9438), for further prosecution of an application after office action thereon.

[1] The question presented for decision is, whether this conclusion is justifiable and sound, and the answer must be found in the statutes and rules of the Patent Office made pursuant to statute, prescribing the action necessary to be taken in order to obtain a

patent, for the whole subject is one of statutory origin and regulation.

The statute which is fundamental to all others in our patent law (R. S. § 4886, as amended March 3, 1897, 29 Stat. 692, c. 391 [Comp. St. § 9430]), provides with respect to the effect of a United States patent upon the filing of a subsequent application for a patent on the same discovery, which is all we are concerned with here, that any discoverer of a patentable invention, not known or used by others in this country, before his invention or discovery, may file an application for a patent upon it, at any time within two years after it may have been patented in this country. Such a prior patent is in no sense a bar to the granting of a second patent for the same invention to an earlier inventor, provided that his application is filed not more than two years after the date of the conflicting patent. The applicant may not be able to prove that he was the first inventor, but the statute gives him two years in which to claim that he was and in which to secure the institution of an interference proceeding in which the issue of priority between himself and the patentee may be determined in a prescribed manner.

This section, unless it has been modified by other statutes, or in effect by decisions of the courts, is plainly not reconcilable with the decision of the Court of Appeals, and should rule it. Has it been so modified?

The section of the Revised Statutes dealing with inventions previously patented in a foreign country (R. S. § 4887, as amended March 3, 1903, 32 Stat. 1225 [Comp. St. § 9431]), provides that no patent shall be

\*136

granted on an \*application for a patent if the invention has been patented in this or any foreign country more than two years before the date of the actual filing of the application in this country.

Section 4897 of the Revised Statutes (16 Stat. 202, c. 230, § 35 [Comp. St. § 9443]), in dealing with the renewal of an application in case of failure to pay the final fee within six months of notice that a patent has been allowed, provides that another application may be made for the invention "the same as in the case of an original application." But such application must be made within two years after the allowance of the original application.

And in R. S. § 4920 (Comp. St. § 9466), providing for pleadings and proofs in infringement suits it is provided that when properly pleaded and noticed the defendant may prove in defense that the patent declared on had been patented prior to the plaintiff's supposed invention "or more than two years prior to his application for a patent therefor," and also that the subject-matter of the patent "had been in public use or on sale in this country for more than two years" before the plaintiff's application for a patent.



Thus through all of these statutes runs the time limit of two years for the filing of an application, there is no modification in any of them of the like provision in R. S. § 4886, as amended (Comp. St. § 9430), and no distinction is made between an original and a later or a divisional application, with respect to this filing right.

A brief reference to the decisions will show that until the Rowntree Case, the courts had left the filing right under R. S. § 4886, as untouched as the statutes thus had left it.

[2] There is no suggestion in the record that the original application of the Chapmans was not prosecuted strictly as required by the statutes and the rules of the Patent Office, and therefore it is settled their rights may not be denied or diminished on the

\*137

ground that such delay may \*have been prejudicial to either public or private interests.

"A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix 30 years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they were unwise or prejudicial to the interests of the public." *United States v. American Bell Telephone Co. et al.*, 167 U. S. 224, 247, 17 Sup. Ct. 809, 813 (42 L. Ed. 144).

In reissue cases, where there was no statutory time prescribed for the making of an application for the correction of a patent, and although unusual diligence is required in such cases, this court adopted the two-year rule as reasonable by analogy to the law of public use before an application for a patent. *Mahn v. Harwood*, 112 U. S. 354, 363, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; *Wollensak v. Reiher*, 115 U. S. 96, 101, 5 Sup. Ct. 1137, 29 L. Ed. 350.

To this we must add that not only have later or divisional applications not been dealt with in a hostile spirit by the courts, but, on the contrary, designed as they are to secure the patent to the first discoverer, they have been favored to the extent that where an invention clearly disclosed in an application, as in this case, is not claimed therein but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice and the later one will be given the filing date of the earlier, with all of its priority of right. *Smith & Griggs Manufacturing Co. v. Sprague*, 123 U. S. 249, 250, 8 Sup. Ct. 122, 31 L. Ed. 141; *Von Recklinghausen v. Dempster*, 34 App. D. C. 474, 476, 477.

These, a few from many, suffice to show that prior to the Rowntree Case, the deci-

sions did not tend to modification of the statutory two-year rule.

The Court of Appeals recognizes all this law as applicable to an original application,

\*138

but it finds warrant for \*cutting the time limit to one year in the case of later applications in three reasons, viz.: Because it is inequitable to allow so long a time as two years for filing a new application, claiming a discovery for which a patent has issued; because such a time allowance is contrary to public policy, as unduly extending the patent monopoly if the new application should prevail; and, finally and chiefly, as we have pointed out, because, regarding such a later application as substantially an amendment to the original application the court discovers, in analogy to the time allowed by statute for amendment to applications (R. S. § 4894), a reason for holding that the failure for more than one year to make a later, in this case a divisional, application, amounts to fatal laches.

However meritorious the first two of these grounds may seem to be they cannot prevail against the provisions of the statutes (*United States v. American Bell Telephone Co.*, supra), and the third does not seem to us persuasive because of the difference in the kind of notice which is given to the applicant under R. S. § 4894, and that given him when a patent is issued conflicting with his application.

The one-year provision of R. S. § 4894, as amended March 3, 1897, 29 Stat. 693 (Comp. St. § 9438), is that an applicant for a patent, who shall fail to prosecute his application within one year after Patent Office action thereon, "of which notice shall have been given" him, shall be regarded as having abandoned his application, unless the Commissioner of Patents shall be satisfied that such delay was unavoidable. But when a conflict between inventions disclosed in applications escapes the attention of the Patent Office Examiners (R. S. § 4904 [Comp. St. § 9449]), and a patent is issued, with claims conflicting with the disclosures of a pending application, the applicant receives only such notice of the conflict as he is presumed to derive from the publication of the

\*139

patent. In the one case the notice \*is actual and specific, in the other it is indefinite and constructive only. When the great number of patents constantly being issued is considered, many of them of a voluminous and complicated character, such as we have in this case, with many and variously worded claims, such an implied notice must necessarily be precarious and indefinite to a degree which may well have been thought to be a sufficient justification for allowing the longer two-year period to inventors who must, at their peril, derive from such notice their knowledge of any conflict with their applications.



As has been pointed out, the Examiner of Interferences did not permit the introduction of any evidence with respect to laches or abandonment and the Court of Appeals rests its judgment, as he did, wholly upon the delay of the Chapmans in filing their divisional application for more than one year after the Wintroath patent was issued, as this appeared "on the face of the record." While not intending to intimate that there may not be abandonment which might bar an application within the two-year period allowed for filing, yet upon this discussion of the statutes and decisions, we cannot doubt that upon the case disclosed in this record, the Chapmans were within their legal rights in filing their divisional application at any time within two years after the publication of the Wintroath patent, and therefore the judgment of the Court of Appeals must be Reversed.

Mr. Justice McREYNOLDS dissents.

(252 U. S. 83)

CHESBROUGH v. NORTHERN TRUST CO.  
et al.

(Argued Jan. 30, 1920. Decided March 1, 1920.)

No. 206.

COURTS  $\S$ 329—WHERE REQUISITE AMOUNT IS ALLEGED, CLEAR ERROR REQUIRED TO SHOW LACK OF JURISDICTION.

Where, in an action in tort, damages exceeding the jurisdictional amount were alleged, and their recovery not impossible under the declaration, and no bad faith appears, it would require very clear error to justify a negation of the trial court's jurisdiction, on review by the Supreme Court of a judgment affirming a judgment for plaintiff.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Consolidated suits by Mary L. Hotchkiss and others against Frank P. Chesbrough. Judgment for plaintiff was affirmed by the Circuit Court of Appeals for the Sixth Circuit (251 Fed. 881, 164 C. C. A. 97), and defendant brings error. On motion of counsel for defendants in error, the death of Mary L. Hotchkiss being suggested, the Northern Trust Company, as her executor, was substituted in her stead. Affirmed.

Mr. Thomas A. E. Weadock, of Detroit, Mich., for plaintiff in error.

Mr. Edward S. Clark, of Bay City, Mich., for defendants in error.

Memorandum opinion under direction of the Court, by Mr. Justice McREYNOLDS.

Each of the three defendants in error instituted a suit against plaintiff in error for damages suffered by reason of his action as a director of the Old Second National Bank, Bay City, Mich. These were consolidated in the District Court, and thereafter all parties

stipulated that, as the facts were approximately the same as in Woodworth v. Ches-

brough et al. (No. 137), the <sup>\*84</sup>"causes shall in all respects and as to all parties therein, be governed and concluded by the final result in the said case" and "that if and when final judgment is entered upon the verdict heretofore rendered in said case No. 137, or on any verdict that may hereafter be rendered therein and when proceedings (if any) for the review of said judgment have been concluded or abandoned so that execution may be issued thereon, then judgment shall be forthwith entered and execution issued in the above entitled causes," for specified amounts.

A judgment against Chesbrough in No. 137 having been affirmed here (244 U. S. 72, 37 Sup. Ct. 579, 61 L. Ed. 1000), the District Court, purporting to enforce the stipulation, entered judgments for defendants in error; and this action was properly approved by the Circuit Court of Appeals (251 Fed. 881, 164 C. C. A. 97). See 195 Fed. 875, 116 C. C. A. 465; 221 Fed. 912, 137 C. C. A. 482.

Plain provisions of the stipulation were rightly applied. The objection, based upon alleged insufficiency of the amount involved, which plaintiff in error urges to the District Court's jurisdiction of the cause first instituted by Mrs. Smalley in the state court and thereafter removed upon his petition, is without merit. The action is in tort; alleged damages exceed the prescribed amount; the declaration discloses nothing rendering such a recovery impossible; no bad faith appears. At this stage of the cause it would require very clear error to justify a negation of the trial court's jurisdiction. *Smithers v. Smith*, 204 U. S. 632, 642, 643, 27 Sup. Ct. 297, 51 L. Ed. 656.

The judgment of the court below is Affirmed.

(252 U. S. 140)

NATIONAL LEAD CO. v. UNITED STATES.

(Argued Jan. 12 and 13, 1920. Decided March 1, 1920.)

No. 123.

1. CUSTOMS DUTIES  $\S$ 100—IN COMPUTING DRAWBACK, DUTIES PROPERLY APPORTIONED BETWEEN MANUFACTURERS IN PROPORTION TO VALUES.

Under Act Aug. 27, 1894, § 22, providing for a drawback on exported articles equal in amount to the duties paid on the imported materials used in their manufacture, less 1 per cent., where linseed oil and linseed oil cake are both derived from imported linseed, the duty is properly distributed between them in proportion to their value, rather than their weight, in view of the long-continued departmental interpretation of the statute to this effect, and its re-enactment without substantial change.

2. STATUTES  $\S$ 219—WEIGHT TO BE GIVEN TO CONSTRUCTION BY EXECUTIVE OFFICERS.

When uncertainty or ambiguity is found in a statute, great weight will be given to the con-

temporaneous construction by department officials called on to act under it, especially when long continued.

3. STATUTES  $\S$  225 $\frac{3}{4}$ —RE-ENACTMENT WITHOUT SUBSTANTIAL CHANGE AMOUNTS TO ADOPTION OF EXECUTIVE CONSTRUCTION.

The repeated re-enactment of a statutory provision without substantial change amounts to an implied legislative recognition and approval of the established executive construction of the statute; Congress being presumed to have legislated with knowledge of the established usage.

Appeal from the Court of Claims.

Suit by the National Lead Company against the United States. The petition was dismissed (53 Ct. Cl. 635), and the claimant appeals. Affirmed.

Messrs. Alexander Britton and Evans Browne, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Davis, for the United States.

\*143

\*Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit to recover the difference between the amount of drawback allowed by the government to the appellant, a corporation, as an exporter of linseed oil cake, and the amount to which it claims to be entitled under section 22 of the Act of Congress effective August 27, 1894 (28 Stat. 509, 551), which reads as follows:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties. \* \* \*"

It is further provided in the section that the drawback due thereon shall be paid to the manufacturer, producer or exporter "under such regulations as the Secretary of the Treasury shall prescribe."

The appellant imported large quantities of linseed upon which it paid a specific duty of 20 cents per bushel of 56 pounds. This seed, when treated by a simple process, yielded about 20 pounds of linseed oil and about 36 pounds of linseed oil cake, to the bushel. The oil was much more valuable than the oil cake; the latter being composed of the solid substance of the seed and a small amount of oil not recovered, which made it valuable as a feed for stock. It is a by-product, and, except for the small amount of oil in it, would be mere waste.

Appellant exported large quantities of oil cake, derived from seed which it had imported, and made demand in proper form

for the drawback provided for by the act of Congress.

The law providing for such drawbacks has differed in form of expression from time to time but, since the Act of August 5, 1861 (12 Stat. c. 45, p. 253), it has not differed

<sup>\*144</sup> in substance from the Act of 1894, as we have quoted it. The number of articles to which the law is applicable is very great, among them, notably, "refined sugar and syrup which come from imported raw sugar and refined sugar and syrup which come from imported molasses."

The Court of Claims found that:

"From August 5, 1861, to the present time the practice of the Treasury Department, where several articles are manufactured from the same imported material, has been to calculate and to pay the drawback by distributing the duty paid on the imported material between such articles in proportion to the value and not in proportion to their weight, as well where the imported material paid a specific as well as where it paid an ad valorem duty. Such calculation and payment had been made under Treasury Department regulations."

[1] The claim of the appellant is that the correct construction of the section, relied upon, requires that the drawback should be computed on the basis of the weights of the oil and oil cake derived by the process of manufacture from the seed, instead of on the basis of the values of the two products, as it was computed by the government, and the question for decision is, whether the department regulation is a valid interpretation of the statute.

The act quoted provides that where imported materials are used in this country in the manufacture of articles which are exported, a drawback shall be allowed "equal in amount to the duties paid on the material used," less 1 per centum. What was the amount of duty paid on the small amount of oil and on the large amount of solid substance, the hull and the fiber, which made up the exported oil cake? Was it substantially two-thirds of the total, determined by weight—on 36 of 56 pounds—or was it about one-fourth of the total as determined by the relative values of the oil and of the oil cake derived from the seed?

\*145

\*The terms of the provision show that the contingency of having one kind of dutiable material, from which two or more kinds of manufactured products might be derived, is not specifically provided for. Obviously only a part, the least valuable part, of the materials or ingredients of the linseed were used in the making of oil cake, and therefore the problem of determining the "drawback equal in amount to the duty paid" on the part so used—the solid parts of the seed and the small amount of oil in the oil cake—was not a simple or an easy one.



The statute, thus indefinite if not ambiguous, called for construction by the department and the regulation adapted to cases such as we have here, commends itself strongly to our judgment.

It does not seem possible that Congress could have intended that two-thirds of the duty should be returned when one-quarter in value of the manufactured product should be exported; or that the exporter should retain 20 pounds of oil, estimated in the findings as worth about 7½ cents a pound, derived from each bushel of seed, and recover two-thirds of the duty paid when he exported 36 pounds of seed cake, worth slightly more than 1 cent a pound, derived from the same bushel of seed. Such results—they must follow the acceptance of the appellant's contention—should be allowed only under compulsion of imperative language such as is not to be found in the section we are considering.

We prefer the reasonable interpretation of the department, which results in a refund of one-quarter of the duty when one-quarter of the value of the product is exported.

[2] From *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603, to *Jacobs v. Prichard*, Trustee, 223 U. S. 200, 32 Sup. Ct. 289, 56 L. Ed. 405, it has been the settled law that, when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its

\*146

provisions into effect, especially where such construction has been long continued, as it was in this case for almost 40 years before the petition was filed. *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627.

To this we must add that the department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products.

[3] The drawback provision, under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870, and the Court of Claims finds that the rule for determining the drawback on oil cake was applied during the whole of that period of almost ten years. The Tariff Act approved July 14, 1870 (16 Stat. 256, 265, c. 255), expressly provided, in the flaxseed or linseed paragraph, "that no drawback shall be allowed on oil cake made from imported seed," and this provision was continued in the Tariff Act of March 3, 1883 (22 Stat. 488, 513), and in the Act of October 1, 1890 (26 Stat. 567, 586). But in the Act of 1894 (28 Stat. 509, 523), the prohibition was eliminated, thus restoring the law on this subject as applied to this material to what it was in substance from 1861 to 1870. *United States v. Philbrick*, 120 U. S. 52, 59,

7 Sup. Ct. 413, 30 L. Ed. 559. During all the intervening 24 years this rule of the department with respect to drawbacks had been widely applied to many articles of much greater importance than linseed or its derivatives, and the practice was continued, linseed included after 1894, until the petition in this case was filed. The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute (*United States v. Philbrick*, supra; *United States v. G. Falk & Brother*, 204 U. S. 143, 152, 27 Sup. Ct. 191, 51 L. Ed. 411; *United*

\*147

*States v. Cerecedo* \**Hermanos y Compania*, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821), for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government (*United States v. Bailey*, 9 Pet. 238, 256, 9 L. Ed. 113).

This case would not deserve even the limited discussion which we thus have given it, were it not for the extensive and long-continued application of the regulation of the department to imported and exported materials other than such as are here involved. This specific case is sufficiently ruled by the clear and satisfactory decision of the Circuit Court of Appeals for the Second Circuit, rendered 22 years ago, in *United States v. Dean Linseed Oil Co.*, 87 Fed. 453, 31 C. C. A. 51, in which the Court of Claims found authority for dismissing the plaintiff's petition. The judgment of the Court of Claims is

Affirmed.

(252 U. S. 32)

In re TIFFANY.

(Argued Jan. 19, 1920. Decided March 1, 1920.)

No. 26, Original.

1. APPEAL AND ERROR  $\S$  71(4)—ORDER DENYING APPLICATION TO DIRECT RECEIVER TO TURN OVER PROPERTY APPEALABLE AS "FINAL DECISION."

An order of the District Court, denying an application to require a receiver appointed by that court to turn over the property in his custody to a receiver appointed by a state court, was appealable to the Circuit Court of Appeals, under Judicial Code, § 128 (Comp. St. § 1120), as a "final decision."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decision.]

2. COURTS  $\S$  405(3) — "FINAL DECISION IN DISTRICT COURT," FROM WHICH APPEAL LIES, DEFINED.

The words "final decision in the District Court," in Judicial Code, § 128 (Comp. St. §



1120), relative to appeals to the Circuit Court of Appeals, mean the same thing as "final judgments and decrees," in former acts regulating appellate jurisdiction.

**3. MANDAMUS**  **4(3)—PROHIBITION**  **3(2)**  
—NOT AVAILABLE TO REVIEW ORDER DENYING APPLICATION TO REQUIRE RECEIVER TO TURN OVER PROPERTY.

As an order denying an application to require a receiver appointed by the District Court to turn over property in his custody to the receiver appointed by a state court was appealable, the applicant could not resort to mandamus or prohibition.

Original application by J. Raymond Tiffany, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Incorporated, for a writ of mandamus, or a writ of prohibition directed to J. Warren Davis, District Judge of the United States for the District of New Jersey. On order to show cause. Rule discharged.

Mr. Merritt Lane, of Newark, N. J., for petitioner.

Mr. Samuel Heyman, of Jersey City, N. J., for respondent.

**\*34**

\*Mr. Justice DAY delivered the opinion of the Court.

This is an application of J. Raymond Tiffany as receiver, appointed by the Court of Chancery of New Jersey, of William Necker, Incorporated, for a writ of mandamus, or in the alternative a writ of prohibition, the object of which is to require the District Judge and the District Court of the United States for the District of New Jersey to order the assets of the corporation, in the hands of a federal receiver, to be turned over to applicant for administration by him as receiver appointed by the New Jersey Court of Chancery.

An order to show cause why the prayer of the petition should not be granted was issued, a return was made by the District Judge and the matter was argued and submitted. The pertinent facts are: On September 30, 1916, creditors and shareholders of William Necker, Incorporated, a corporation of the state of New Jersey, filed a bill in the United States District Court of New Jersey

**\*35**

alleging the \*insolvency of the corporation, praying for the appointment of a receiver, and a distribution of the corporate assets among the creditors and shareholders. The bill alleged diversity of citizenship as a ground for jurisdiction. The defendant corporation appeared and answered, admitting the allegations of the bill, and joined in the prayer that its assets be sold and distributed according to law. Upon consent the District Court appointed a receiver. The estate is insolvent, and the assets in the hands of the federal receiver are insufficient to pay creditors, and shareholders will receive nothing. On April 1, 1919, 2½ years after the appoint-

ment of the federal receiver, creditors of William Necker, Incorporated, filed a bill in the Court of Chancery of New Jersey alleging the corporation's insolvency, praying that it be decreed to be insolvent, that an injunction issue restraining it from exercising its franchises, and that a receiver be appointed to dispose of the property, and distribute it among creditors and shareholders. A decree was entered in said cause adjudging the corporation insolvent, and appointing the petitioner, J. Raymond Tiffany, receiver. Thereupon Tiffany made application to the United States District Court asking that its injunction enjoining the corporation and all of its officers and all other persons from interfering with the possession of the federal receiver be dissolved, that the federal receivership be vacated, and that the federal receiver turn over the assets of the company then in his hands, less administration expenses, to the chancery receiver for final distribution—the contention being that the appointment of the chancery receiver and the proceedings in the state court superseded the federal proceeding, and deprived the federal court of jurisdiction.

The federal receiver had made various reports and conducted the business of the corporation up until the time of the application

**\*36**

in the Court of Chancery of New \*Jersey, in which the applicant was appointed receiver. It appears that the applicants in the state court also filed their verified claims with the federal receiver, and that no creditor or shareholder made objection to the exercise of the jurisdiction of the federal court until the application in the state court.

The federal District Court permitted the chancery receiver to intervene, heard the parties, and delivered an opinion in which the matter was fully considered. As a result of such hearing and consideration an order was entered in which it was recited that Tiffany, the state receiver, had made an application to the federal District Court for an order directing it to turn over to the chancery receiver all of the assets of the corporation in the possession of the federal receiver, and the District Court ordered, adjudged and decreed that the said application of J. Raymond Tiffany, receiver in chancery, "be and the same hereby is denied."

[1, 2] By Judicial Code, § 128 (Comp. St. § 1120), the Circuit Court of Appeals is given appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, with certain exceptions not necessary to be considered. It is clear that the order made in the District Court refusing to turn over the property to the chancery receiver was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the Circuit Court of Appeals. By the order the right of the state receiver to possess and adminis-

ter the property of the corporation was finally denied. The words "final decision in the District Court" mean the same thing as "final judgments and decrees," as used in former acts regulating appellate jurisdiction. *Loveland on Appellate Jurisdiction of Federal Courts*, § 39. This conclusion is amply sustained by the decisions of this court. *Savannah v. Jesup*, 106 U. S. 563, 1 Sup. Ct. 512, 27 L. Ed. 276; *Gumbel v. Pitkin*, 113 U. S.

\*37

545, 5 Sup. Ct. 616, 28 L. Ed. 1128; *\*Krippendorf v. Hyde*, 110 U. S. 276, 287, 4 Sup. Ct. 27, 28 L. Ed. 145. See also a well-considered case in the Circuit Court of Appeals, *Ninth Circuit—Dexter Horton National Bank v. Hawkins*, 190 Fed. 924, 111 C. C. A. 514.

[3] It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. In re *Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; *Ex Parte Oklahoma*, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431. As the petitioner had the right of appeal to the Circuit Court of Appeals he could not resort to the writ of mandamus or prohibition. It results that an order must be made discharging the rule.

Rule discharged.

(252 U. S. 159)

ASH SHEEP CO. v. UNITED STATES (two cases).

(Argued Jan. 30, 1920. Decided March 1, 1920.)

Nos. 212, 285.

1. INDIANS ⇨37—LANDS CEDED TO GOVERNMENT REMAINED "INDIAN LANDS" WITHIN STATUTE AS TO DRIVING STOCK THEREON.

Lands ceded to the United States by the Crow Indians by the agreement ratified by Act April 27, 1904, which agreement provided for the use of proceeds of sales for the benefit of the Indians, are "Indian lands," within Rev. St. § 2117 (Comp. St. § 4107), imposing a penalty for driving stock on the lands of Indians to range.

2. INDIANS ⇨11—NATURE OF TITLE ACQUIRED BY CESSION TO GOVERNMENT DEPENDS ON TERMS OF AGREEMENT OR TREATY.

Whether the government becomes a trustee for the Indians, or acquires an unrestricted title, by a cession of their lands, depends in each case upon the terms of the agreement or treaty by which the cession is made.

3. INDIANS ⇨37—STATUTE IMPOSING PENALTY FOR DRIVING "CATTLE" TO RANGE ON INDIAN LANDS INCLUDES SHEEP.

Rev. St. § 2117 (Comp. St. § 4107), imposing a penalty for driving any stock of horses, mules, or cattle to range on lands of Indians, includes sheep in the term "cattle," in view of the definition of that word by lexicographers as including domestic quadrupeds other than those of the bovine family, and the construction

of the statute by courts and the Department of Justice for almost 50 years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cattle.]

4. STATUTES ⇨241(1)—RULE AS TO STRICT CONSTRUCTION OF PENAL STATUTES NOT VIOLATED BY GIVING FULL MEANING TO LANGUAGE.

The rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context and most fully promotes the policy and objects of the Legislature.

5. JUDGMENT ⇨589(1)—DECREE FOR NOMINAL DAMAGES IN INJUNCTION SUIT NOT BAR TO ACTION FOR STATUTORY PENALTY.

Where, in a suit to enjoin defendant from grazing sheep on Indian lands, the government prayed for the amount of the statutory penalty, which was denied, on the ground that equity would not aid the collection of penalties, and, there being no evidence of substantial damages, nominal damages only were allowed, the recovery thereof did not bar an action at law for the statutory penalty.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit in equity and action at law by the United States against the Ash Sheep Company. A decree in the equity suit and a judgment in the action at law, each for the United States, were affirmed by the Circuit Court of Appeals, Ninth Circuit (250 Fed. 591, 162 C. C. A. 607; 250 Fed. 592, 162 C. C. A. 608), and defendant appeals in the one case and brings error in the other. Affirmed.

Messrs. Cornelius B. Nolan and William Scallon, both of Helena, Mont., for appellant and plaintiff in error.

Mr. Assistant Attorney General Nebeker, for the United States.

\*163

\*Mr. Justice CLARKE delivered the opinion of the Court.

These two cases were argued and will be decided together.

No. 212 is an appeal from a decree, entered in a suit in equity, in favor of the government granting a permanent injunction restraining the appellant from trespassing upon described lands in Montana by grazing sheep thereon and for nominal damages for such trespass.

No. 285 is a proceeding in error, in which reversal is sought of a judgment rendered in an action at law against plaintiff in error, appellant in the equity suit, for a penalty for the same trespass.

The validity of the right asserted by the government, in both cases, turns upon whether the lands involved were "Indian lands"



or "public lands." If they were the former, the decree in the equity case should be affirmed, but in the law case there would remain the question as to whether "sheep" were within the terms of the act under which the penalty was imposed.

In both cases the government contends that the appellant violated section 2117 of the Revised Statutes of the United States (Comp. St. § 4107), which reads as follows:

"Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

The company admits that it pastured 5,000 sheep on the described lands without the consent of the Crow Tribe of Indians or of the United States, but denies that they were "Indian lands" and contends that they were "public lands," upon which it was lawful for it to pasture its stock.

[1] Whether the described lands were Indian or public lands depends upon the construction to be given the act of Congress, approved April 27, 1904 (33 Stat. 352, c. 1624),

\*164

entitled "An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect."

The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on boundary lines which were described, and the lands involved in this case were within the part of the reservation as to which the Indians, in terms, "ceded, granted and relinquished" to the United States all of their "right, title and interest."

The argument of the Sheep Company is that the United States being owner of the fee of the land before the agreement, the effect of this grant and release of their possessory right by the Indians was to vest the complete and perfect title in the government, and thereby make the territory a part of the public lands with the interest of the Indians transferred to the proceeds to be derived from them. For this conclusion the following cases are cited: *United States v. Choctaw Nation and Chickasaw Nation*, 179 U. S. 494, 21 Sup. Ct. 149, 45 L. Ed. 291; *Bean v. Morris*, 159 Fed. 651, 86 C. C. A. 519; *Id.*, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821. But in the first of these cases the Indians parted with their possessory rights for a cash payment by the United States (179 U. S. 527, 21 Sup. Ct. 149, 45 L. Ed. 291), and in the second the character of the agreement under which the Indian title was said, incidentally, to have terminated, does not appear.

[2] Whether or not the government became trustee for the Indians or acquired an unrestricted title by the cession of their lands, depends in each case upon the terms of the

agreement or treaty by which the cession was made. *Minnesota v. Hitchcock*, 185 U. S. 373, 394, 398, 22 Sup. Ct. 650, 46 L. Ed. 954; *United States v. Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 509, 33 Sup. Ct. 811, 57 L. Ed. 1299.

The agreement we have in this case is elaborate and, in consideration of the grant by the Indians of their possessory right, the government assumed many obligations with respect to the lands and the proceeds of them

\*165

—notably, that it would sell the land to settlers, except sections 16 and 36, for not less than \$4 per acre and would pay the proceeds to the Indians, under the direction of the Secretary of the Interior, in a manner prescribed. Thus, the government contracted to expend \$90,000 of the proceeds of the land in the extension of the irrigation system on the reservation remaining, \$295,000 in the purchase of stock to be placed on the reservation, with a further contingent purchase in contemplation of \$200,000, \$40,000 in fencing, \$100,000 for schools, and \$10,000 for a hospital for the Indians, for the maintenance of which \$50,000 additional was to be held in trust. It was further provided that, to the extent that feasible irrigation prospects could be found, parts of the released lands should be withdrawn under the Reclamation Act and be disposed of within five years, but not for less than \$4 an acre.

There were many other like provisions, all intended to secure to the Indians the fullest possible value for what are referred to in the agreement as "their lands" and to make use of the proceeds for their benefit.

It was provided that semiannual reports should be made by the Secretary of the Interior to the Indians, showing the amounts expended from time to time and the amounts remaining in each of the several funds.

It is obvious that the relation thus established by the act between the government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust. *Minnesota v. Hitchcock*, 185 U. S. 373, 394, 398, 22 Sup. Ct. 650, 46 L. Ed. 954. And that this was precisely the light in which the Congress regarded the whole transaction, is clear from the terms of the concluding section, the eighth:

"That nothing in this act contained shall in any manner bind the United States to purchase

\*166

any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." 33 Stat. pp. 352, 361, c. 1624.



Taking all of the provisions of the agreement together, we cannot doubt that, while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "public lands" in the sense of being subject to sale, or other disposition, under the General Land Laws. *Union Pacific R. R. Co. v. Harris*, 215 U. S. 386, 388, 30 Sup. Ct. 138, 54 L. Ed. 246. They were subject to sale by the government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in Act April 27, 1904 (33 Stat. 352), and as to this point the case is ruled by the *Hitchcock and Chipewa Cases*, supra. Thus we conclude that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them, in violation of section 2117 of Revised Statutes, and the decree in No. 212 must be affirmed.

[3] There remains the question as to the construction of R. S. § 2117.

In the law case it is admitted in the bill of exceptions that the Sheep Company, without the permission of the Crow Tribe of Indians or of the United States, drove, ranged, and grazed 5,000 head of sheep on the land described in the complaint, and that at the

<sup>\*167</sup> time no settle<sup>ment</sup> or entries thereon had been authorized under acts of Congress. The judgment against the company was for \$5,000—\$1 for each sheep pastured on the land.

The company contends that the judgment should be reversed for the reason that R. S. § 2117, imposes the penalty prescribed, only, for ranging and feeding on the lands of an Indian tribe without permission "any stock of horses, mules, or cattle," and that "sheep" are not within its terms.

If this were a recent statute, and if we were giving it a first interpretation, we might hesitate to say that by the use of the word "cattle" Congress intended to include "sheep."

But the statute is an old one, which has been interpreted in published reports of the courts for almost 50 years, and in an opinion by the Attorney General of the United States, rendered in 1884, as fairly comprehending "sheep" within the meaning of the word "cattle" as used in it.

The statute first appears as section 2 of an "Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," enacted in 1796 and was then applicable only to "any stock of horses or cattle," etc. 1 Stat. 469, 470. The section was re-enacted without change in 1802.

2 Stat. 139, 141. In 1834 it was given its present form, which was carried into the Revised Statutes, without change in the wording we are considering. R. S. § 2117.

In 1871 suit was brought in the United States District Court for the District of Oregon, claiming that penalties under the section had been incurred by pasturing "sheep," as in this case, on Indian lands without the consent of the tribe. In a carefully prepared and clearly reasoned opinion Judge Deady overruled a demurrer to the complaint, and held that "sheep" were clearly within the mischief to be remedied and fairly with-

in the language of the act. <sup>\*168</sup> This case has not been overruled or modified by any later decision. The court quotes definitions of the word "cattle" from several dictionaries, emphasizing especially, this from the 1837 edition of Webster:

"In its primary sense, the word includes, camels, horses, asses, all the varieties of domesticated horned beasts of the bovine genus, sheep of all kinds and goats, and perhaps swine. \* \* \* Cattle in the United States, in common usage, signifies only beasts of the bovine genus."

Upon this authority, and applying the rule that in determining the legislative intent the mischief to be prevented should be looked to, and saying that "it will not be denied that sheep are as much within the mischief to be remedied as horses or oxen," the court concludes:

"I have no hesitation in coming to the conclusion that the word cattle, as used in the Indian Intercourse Act of 1834 [Comp. St. § 4107] includes, and was intended to include, sheep, as well as cows and oxen." *United States v. Mattock*, 2 Sawy. 148, Fed. Cas. No. 15,744.

Twelve years later, in 1884, the Attorney General of the United States, in an opinion to the Secretary of War, regarded the question as so little doubtful that he disposed of it in this single sentence:

"The standard lexicographers place sheep under the head of cattle, and it would seem to be in derogation of the manifest intention of Congress to take the word in a more confined sense." 18 Opinions of Attorneys General, p. 91.

In 1874, in *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 22 L. Ed. 560, this court held that the word "cattle," in a letter of credit guaranteeing "drafts on shipments of cattle," was comprehensive enough to justify the giving of credit on shipments of "hogs." This pertinent paragraph is from the opinion:

"That stock of some kind formed part of the guarantee is quite plain, but is the word 'cattle' in this connection to be confined to neat cattle alone; that is, cattle of the bovine genus? It <sup>\*169</sup> is often so applied, but it is [quoting \*from Wor-

cester's Dictionary] 'also a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine.' In its limited sense, it is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man. In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, pigs were held to be included within the words 'any cattle.'

The most recent definitions of the dictionaries are as follows:

Webster's New International Dictionary defines "cattle" thus:

"Collectively, live animals held as property or raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses, swine," etc.

The Standard Dictionary defines the word as meaning:

"Domesticated bovine animals, as oxen, cows, bulls, and calves; also, though seldom now as compared with former times, any live stock, kept for use or profit, as horses, camels, sheep, goats, swine" etc.

Thus, although the word "sheep" is not in the section, and although in present day usage the word "cattle" would rarely be used with a signification sufficiently broad to include them, nevertheless, since the pasturing of sheep is plainly within the mischief at which this section aimed, since the word "cattle," which is used, may be given, say all the authorities, a meaning comprehensive enough to include them, and since the courts and the Department of Justice for almost 50 years have interpreted the section as applicable to "sheep," we accept this as the intended meaning of the section, for, had it been otherwise, Congress, we must assume, would long since have corrected it.

\*170

[4] \*It is argued that the rule that penal statutes must be strictly construed forbids such latitude of construction. But this is sufficiently and satisfactorily answered by repeated decisions of this court.

"The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the Legislature." *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *United States v. Lacher*, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080.

[5] It is also contended far from confidently, that the recovery of nominal damages in the equity suit is a bar to the recovery of the penalty in the case at law. While the amount of the statutory penalty for the tres-

pass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties (*Marshall v. Vicksburg*, 15 Wall. 146, 149, 21 L. Ed. 121), and that no evidence of substantial damage had been introduced, limited the recovery to one dollar and costs. Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of Appeals that—

"A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered."

It results that the decree in No. 212 and the judgment in No. 285 must both be Affirmed.

(252 U. S. 171)

GAYON v. McCARTHY, U. S. Marshal, et al.  
(Argued Jan. 6, 1920. Decided March 1, 1920.)

No. 540.

1. CRIMINAL LAW §242(7)—PRIMA FACIE CASE FOR REMOVAL OF ACCUSED TO DISTRICT WHERE INDICTED ESTABLISHED.

In a proceeding for the removal of a person indicted in another state to such state, the introduction of the indictment and defendant's admission that he was the person named therein made a prima facie case, in the absence of other evidence.

2. CRIMINAL LAW §242(7)—EVIDENCE SUFFICIENT TO WARRANT REMOVAL TO STATE IN WHICH ACCUSED WAS INDICTED.

In a proceeding to remove a person to another state in which he was indicted for conspiring to retain a citizen to enlist in the Mexican revolutionary forces, evidence held to tend to show a violation of Cr. Code, § 10, as amended by Act May 7, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10174), and to show probable cause for believing defendant guilty of conspiring to compass such violation.

3. CRIMINAL LAW §113—DISTRICT COURT OF DISTRICT WHERE ACTS IN PURSUANCE OF CONSPIRACY WERE COMMITTED HAD JURISDICTION.

Where, by communication and concerted action between defendant in New York and other parties in Texas, a United States citizen was induced to go from New York to the Mexican border to join the insurgent forces, and one of the parties conferred with him and acted in promotion of the conspiracy in the Southern district of Texas, the court of that district had jurisdiction of an indictment for the conspiracy.

4. NEUTRALITY LAWS §3—HOW ONE MAY BE "RETAINED" TO ENTER SERVICE OF FOREIGN PEOPLE STATED.

Cr. Code, § 10, as amended by Act May 7, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10174), as to hiring or retaining another to go outside the United States with in-



tent to enlist in the service of a foreign people, uses "retain" as an alternative to "hire," and as meaning something different from the usual employment with payment in money; and one may be retained, in the sense of engaged, to render a service by a verbal promise, and by a prospect for advancement or payment in the future.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Retain.]

Appeal from and in Error to the District Court of the United States for the Southern District of New York.

Habeas corpus by Roberto Gayon against Thomas D. McCarthy, United States Marshal for the Southern District of New York, and another. The writ was discharged, and petitioner appeals and brings error. Affirmed.

Mr. Wm. S. Bennet, of New York City, for appellant and plaintiff in error.

Mr. Assistant Attorney General Stewart, for appellee and defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

The appellant, Gayon, was indicted in the Southern district of Texas for conspiring (section 37 of the Criminal Code [Comp. St. § 10201]) with one Naranjo, of San Antonio, Texas, and with one Mendoza, of Laredo, Texas, about January 1, 1919, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in military forces organized in the interest of Felix Diaz, then in revolt against the government of Mexico, with which the United

\*172

\*States was at peace, in violation of section 10 of the Criminal Code, as amended May 7, 1917, 40 Stat. 39, chapter 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10174).

Gayon was arrested in New York, and, after a full hearing before a commissioner of the United States, was held subject to the order of the District Court for his removal to Texas.

Thereupon, by petition for writs of habeas corpus and certiorari, the case was removed to the District Court for the Southern District of New York, and, upon a hearing on a transcript of the evidence before the commissioner, that court discharged the writ of habeas corpus and entered an order that a warrant issue for the removal of the appellant to Texas. An appeal brings this order here for review.

The principles and practice applicable to this case are abundantly settled. *Greene v. Henkel*, 183 U. S. 249, 261, 22 Sup. Ct. 218, 46 L. Ed. 177; *Beavers v. Haubert*, 198 U. S. 77, 24 Sup. Ct. 605, 48 L. Ed. 882; *Hyde v. Shine*, 199 U. S. 62, 84, 25 Sup. Ct. 760, 50 L. Ed. 90; *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689; *Haas v. Henkel*, 216 U. S. 462, 475, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; *Price v. Henkel*, 216 U. S. 488, 490, 30 Sup. Ct. 257, 54 L. Ed. 581; *Hyde v. United States*, 225 U. S. 347, 32 Sup.

Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; *Brown v. Elliott and Moore v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136; *Henry v. Henkel*, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203.

Of many errors assigned only two are argued, viz: That the court erred in holding: (1) That the acts committed by the appellant "of which there was any evidence before the commissioner" constituted a crime under section 10 of the Penal Code, and (2) that the evidence before the commissioner showed probable cause for believing the defendant guilty of the crime charged in the indictment.

By these assignments of error the correct rule of decision is recognized, that if there was before the commissioner or District Court evidence showing probable cause for believing the defendant guilty of having conspired with Naranjo or Mendoza, when either was in the Southern district of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican government, the order of the District Court must be affirmed.

\*173

\*The evidence before the commissioner, carried to the District Court, may be summarized as follows:

[1] The government introduced the indictment and, with the admission by Gayon that he was the person named therein, rested. This established a prima facie case in the absence of other evidence. *Tinsley v. Treat*, 205 U. S. 20, 31, 27 Sup. Ct. 430, 51 L. Ed. 689, and cases cited.

[2] Thereupon the testimony of the accused and of one Del Villar was introduced by appellant, and that of Averitt by the government, which we condense into narrative form:

For five years before the arrest, Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican government.

The accused, Gayon, is a Mexican citizen, and during several administrations prior to that of Carranza had served as consul for the Mexican government at Roma, Texas, and at other places within and without the United States. For about two years he had been secretary to Del Villar and for some time prior to his arrest was in the joint service and pay of Del Villar and General Aurelio Blanquet, the latter then in Mexico serving with the forces of Diaz.

Naranjo was editor and publisher of a newspaper at San Antonio, Texas, called "Revista Mexicana" (Mexican Review), which was opposed to the established Mexican government and favorable to the revolutionists operating in the interest of Diaz.

On December 12, 1918, Gayon wrote from New York to Naranjo at San Antonio to secure an advertisement in the Review for "my work 'El General Blanquet,'" saying, "There



are some reasons that you may know in the next few days why I want a big circulation of the book," asking if he might send some

\*174

copies to be sold at the newspaper \*office, and concluding, "I will await your letters hoping to give you good news in my next letter."

On December 23, 1918, Gayon wrote Naranjo, addressing him as "My dear Friend," and saying that he had received his letter of the 18th instant. In this letter a discussion of the sale of his book "El General Blanquet" is followed by comment on the activities of other persons, in which he discourages new projects and urges joining "with the National Union Committees," which he states had already passed the embryonic state and now constitute a reality. He concludes:

"God grant us, now that we are on the threshold of success, we may leave aside our obstinate custom of projecting, and go ahead to produce results exclusively."

On January 14, and again on January 21, 1919, he addressed Naranjo as "My dear Friend" and discussed further advertising and circulating of his book.

This correspondence makes it clear enough that Gayon, although in New York, in December, 1918, and January, 1919, was in close association with Naranjo, and that the two were actively engaged in promoting opposition to the established Mexican government.

On January 5, 1919, Foster Averitt, an American citizen, whose home was in Texas, called at the office of Gayon, and what passed between them is derived from the testimony of the two, as follows:

Averitt had recently resigned from the United States Naval Academy at Annapolis and, being without employment, says that he called at the office of Gayon, for the purpose of securing, if possible, a position in Mexico or Central America as an engineer. He was wearing his uniform as midshipman of the United States Navy and he first showed Gayon some official papers, which the latter did not read, and then said that he was of the United States Navy, and that he must go at once to Mexico to see Generals Diaz and

\*175

Blanquet personally. He did not give \*any reason for desiring to see these men but asked for letters of introduction to them, which Gayon refused until he could confer with Del Villar. Averitt returned the next day and, after discussing with Gayon conditions in Mexico, the location of the several armed forces near the border, and whether he should go by sea to Vera Cruz or overland, he again left for the day. On returning the next day he received from Gayon two letters, one addressed to Naranjo, at San Antonio, and one to "General Aurelio Blanquet, General Headquarters, Mexico."

Gayon had no knowledge of or acquaintance with Averitt before his first call at his office and he did not present any letters of introduction, but in the letter to Naranjo

Gayon introduced him as "undertaking a trip to Mexico on special mission to General Felix Diaz and Aurelio Blanquet," and requested that he "supply him the necessary information to enable him to make his trip as quickly as possible."

The letter which he gave to Averitt addressed to General Blanquet opens with this paragraph:

"The bearer, Mr. Foster Averitt, Marine Guard of the United States, will inform you about the reasons for his trip and of the work we are undertaking here. I kindly request from you, after meeting Mr. Foster [sic], to be good enough to introduce him to General Felix Diaz, as he wants to take up some matters with both of you."

The remainder of the letter explains how he had given publicity to "the recent successful arrival" of the general in Mexico and the motives inspiring the movement of reorganization under the leadership of General Diaz. It predicts early recognition by our government of the belligerency of the Diaz insurgents and urges the general to write as often as possible to enable "us to continue our campaign of propaganda."

Supplied with these letters, Averitt straightway went to San Antonio and pre-

\*176

sented his letter to Naranjo, who, \*after some conferences with him, gave him a letter to General Santiago Mendoza, at Laredo, on the border. This letter was presented to Mendoza and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were arrested by customs guards and the proceedings we are considering followed.

In the interviews in New York there was suggestion of payment of expenses and a commission for Averitt, but Gayon, saying that the furnishing of either would violate the neutrality laws of the United States, told him there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico and the last thing he said to him when leaving was "that he expected that he should be at least a colonel when he saw him again down there." He told him it might be possible to have his expenses made up to him when he arrived in Mexico, and, as a matter of fact, he received \$15 from General Mendoza at Laredo.

The statute which Gayon is charged with violating provides:

"That whoever within the territory or jurisdiction of the United States \* \* \* hires or retains another \* \* \* to go beyond the limits or jurisdiction of the United States with intent to be enlisted \* \* \* in the service of another foreign \* \* \* people" shall be punished as provided.

And the overt acts charged in the indictment are: That Gayon delivered to Averitt at New York a letter addressed to Naranjo, and at the same time gave him instructions with respect to presenting it and impliedly

promised Averitt that upon his arrival in Mexico he would be given a commission in the army of General Blanquet; that at the same time he delivered to Averitt a letter addressed to General Blanquet, who was then in Mexico in command of revolutionary forces; that Averitt visited and held conferences with Naranjo, who gave him a letter to Mendoza, at Laredo, in the Southern district of

\*177

\*Texas; and that Averitt, under instructions received from Naranjo, called upon and conferred with Mendoza at Laredo and with him arranged to enter Mexico with others, with intent to join the forces of Diaz under General Blanquet.

While the narration of what took place between Gayon and Averitt does not show a hiring of the latter in the ordinary sense of the word, yet, when taken with the conduct of Averitt in going immediately to Texas, and in attempting to cross into Mexico, plainly, it tends to show that Gayon retained Averitt in the sense of engaging him to go to Mexico, that he was induced to enter into that engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there and that he would probably be reimbursed for his expenses.

[3] There was also evidence tending to show that by communication and concerted action between Gayon, Naranjo and Mendoza, Averitt was induced to go from New York to the border and would have succeeded in reaching Mexico and joining the insurgent forces but for the vigilance of the United States officers who arrested him. The evidence also is that Mendoza conferred with Averitt and acted in promotion of the conspiracy when in the Southern district of Texas, thus establishing the jurisdiction of the court to which the indictment was returned, under Hyde and Schneider v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, and Brown v. Elliott and Moore v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136.

[4] The word "retain" is used in the statute as an alternative to "hire" and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash. As stated long ago by a noted Attorney General, in an opinion dealing with this statute:

\*178

"A party may be retained by verbal promise or invitation for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hire, to invite without recruiting, \* \* \* it would be idle to pass acts of Congress for the punishment of this or any other offenses." Opinions of the Attorney General, vol. 7, pp. 367, 378, 379.

This discussion of the record makes it sufficiently clear that there was substantial evidence before the commissioner and the court tending to show that section 10 of the Criminal Code had been violated and that there was probable cause for believing the appellant guilty of conspiring with Naranjo and Mendoza to compass that violation, as charged in the indictment, and therefore the order of the District Court must be Affirmed.

(251 U. S. 524)

BATES v. DRESSER. DRESSER v. BATES.  
BATES v. DEAN et al. SAME v.  
BUNKER et al.

(Argued Jan. 19 and 20, 1920. Decided  
March 1, 1920.)

Nos. 155-158.

1. BANKS AND BANKING ⚡253—DIRECTORS NOT GUILTY OF ACTIONABLE NEGLIGENCE IN FAILING TO DISCOVER BOOKKEEPER'S THEFT.

Where the bookkeeper of a national bank stole a great part of its assets, concealing his thefts by overcharging depositors and thus reducing the apparent liabilities of the bank, the directors *held* not guilty of such negligence as charged them with liability for the losses by accepting the cashier's statements of liabilities and failing to inspect the depositors' ledger, although a by-law required the appointment of a committee every six months to count the cash and compare its assets and liabilities with the balances on the general ledger.

2. BANKS AND BANKING ⚡253—PRESIDENT OF NATIONAL BANK GUILTY OF NEGLIGENCE IN FAILING TO DISCOVER BOOKKEEPER'S THEFT.

Where the bookkeeper of a national bank stole a great part of its assets concealing his thefts by overcharging depositors, the president of the bank *held* guilty of negligence making him liable for the bank's losses where he had knowledge of unexplained shortages, the disappearance of a package left for safe-keeping, the seeming rapid decline in deposits, and suspicious circumstances regarding the bookkeeper's conduct.

3. BANKS AND BANKING ⚡254—INTEREST ON AMOUNT RECOVERABLE FROM OFFICER FOR NEGLIGENCE IS A MATTER OF DISCRETION.

Whether interest should be charged on the amount recovered from the president of a national bank for negligence is a question of discretion, and not of right.

4. INTEREST ⚡53—ALLOWED, ON RECOVERY FOR NEGLIGENCE, FROM DATE OF DECREE TO DATE OF RECEIVER'S APPEAL.

In an action against the president of a national bank for negligence, where a judgment in favor of plaintiff, the receiver of the bank, was reduced by the Circuit Court of Appeals, and the receiver appealed, interest is properly allowed, to the extent that the decree of the District Court was affirmed, to the time the



receiver interposed a delay by taking his appeal.

Mr. Justice McKenna and Mr. Justice Pitney dissenting.

Appeals from the United States Circuit Court of Appeals for the First Circuit.

Suit by John L. Bates, receiver of the National City Bank of Cambridge, Mass., against Sumner Dresser, administrator of Edwin Dresser, deceased, and others. From a decree of the Circuit Court of Appeals (250 Fed. 525, 162 C. C. A. 541), reversing a decree of the District Court (229 Fed. 772), and dismissing the bill as against some of the defendants, the receiver and certain defendants appeal. Modified and affirmed.

\*525

\*Messrs. Frank N. Nay and William A. Kneeland, both of Boston, Mass., for receiver.

Messrs. Robert G. Dodge and Robert M. Morse, both of Boston, Mass., for Dresser.

\*526

\*Messrs. Clarence Alfred Bunker and Albert E. Pillsbury, both of Boston, Mass., for Bunker and Hardy.

Mr. Albert E. Pillsbury, of Boston, Mass., for Dean and others.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the receiver of a national bank to charge its former president and directors with the loss of a great part of its assets through the thefts of an employé of the bank while they were in power. The case was sent to a master who found for the defendants; but the District Court entered a decree against all of them. 229 Fed. 772. The Circuit Court of Appeals reversed this decree, dismissed the bill as against all except the administrator of Edwin Dresser, the president, cut down the amount with which he was charged<sup>1</sup> and refused to add interest from the date of the decree of the District Court. *Dresser v. Bates*, 250 Fed. 525, 162 C. C. A. 541. Dresser's administrator and the receiver both appeal, the latter contending that the decree of the District Court should be affirmed with interest and costs.

The bank was a little bank at Cambridge with a capital of \$100,000 and average deposits of somewhere about \$300,000. It had a cashier, a bookkeeper, a teller and a messenger. Before and during the time of the losses Dresser was its president and executive officer, a large stockholder, with an inactive deposit of from \$35,000 to \$50,000. From July, 1903, to the end, Frank L. Earl was cashier. Coleman, who made the trouble, entered the service of the bank as messenger in September, 1903. In January, 1904, he was promoted to be bookkeeper, being then not quite eighteen but having studied bookkeeping. In the previous August an auditor employed on the retirement of a cashier had

reported that the daily balance book was very much behind, that it was impossible to

\*527

\*prove the deposits, and that a competent bookkeeper should be employed upon the work immediately. Coleman kept the deposit ledger and this was the work that fell into his hands. There was no cage in the bank, and in 1904 and 1905 there were some small shortages in the accounts of three successive tellers that were not accounted for, and the last of them, Cutting, was asked by Dresser to resign on that ground. Before doing so he told Dresser that someone had taken the money and that if he might be allowed to stay he would set a trap and catch the man, but Dresser did not care to do that and thought that there was nothing wrong. From Cutting's resignation on October 7, 1905, Coleman acted as paying and receiving teller, in addition to his other duty, until November, 1907. During this time there were no shortages disclosed in the teller's accounts. In May, 1906, Coleman took \$2,000 cash from the vaults of the bank, but restored it the next morning. In November of the same year he began the thefts that come into question here. Perhaps in the beginning he took the money directly. But as he ceased to have charge of the cash in November, 1907, he invented another way. Having a small account at the bank, he would draw checks for the amount he wanted, exchange checks with a Boston broker, get cash for the broker's check, and, when his own check came to the bank through the clearing house, would abstract it from the envelope, enter the others on his book and conceal the difference by a charge to some other account or a false addition in the column of drafts or deposits in the depositors' ledger. He handed to the cashier only the slip from the clearing house that showed the totals. The cashier paid whatever appeared to be due and thus Coleman's checks were honored. So far as Coleman thought it necessary, in view of the absolute trust in him on the part of all concerned, he took care that his balances should agree with those in the cashier's book.

\*528

\*By May 1, 1907, Coleman had abstracted \$17,000, concealing the fact by false additions in the column of total checks, and false balances in the deposit ledger. Then for the moment a safer concealment was effected by charging the whole to Dresser's account. Coleman adopted this method when a bank examiner was expected. Of course when the fraud was disguised by overcharging a depositor it could not be discovered except by calling in the passbooks, or taking all the deposit slips and comparing them with the depositors' ledger in detail. By November, 1907, the amount taken by Coleman was \$30,100, and the charge on Dresser's account was \$20,000. In 1908 the sum was raised from \$33,000 to \$49,671. In 1909 Coleman's activity began to increase. In January he

<sup>1</sup> To \$264,088.02.



took \$6,829.26; in March, \$10,833.73; in June, his previous stealings amounting to \$83,390.94, he took \$5,152.06; in July, \$18,050; in August, \$6,250; in September, \$17,350; in October, \$47,277.08; in November, \$51,847; in December, \$46,956.44; in January, 1910, \$27,395.53; in February, \$6,473.97; making a total of \$310,143.02, when the bank closed on February 21, 1910. As a result of this the amount of the monthly deposits seemed to decline noticeably and the directors considered the matter in September, but concluded that the falling off was due in part to the springing up of rivals, whose deposits were increasing, but was parallel to a similar decrease in New York. An examination by a bank examiner in December, 1909, disclosed nothing wrong to him.

In this connection it should be mentioned that in the previous semi-annual examinations by national bank examiners nothing was discovered pointing to malfeasance. The cashier was honest and everybody believed that they could rely upon him, although in fact he relied too much upon Coleman, who also was unsuspected by all. If Earl had opened the envelopes from the clearing house, and had seen the checks, or had ex-

\*529

amined the deposit \*ledger with any care he would have found out what was going on. The scrutiny of anyone accustomed to such details would have discovered the false additions and other indicia of fraud that were on the face of the book. But it may be doubted whether anything less than a continuous pursuit of the figures through pages would have done so except by a lucky chance.

[1] The question of the liability of the directors in this case is the question whether they neglected their duty by accepting the cashier's statement of liabilities and failing to inspect the depositors' ledger. The statements of assets always were correct. A by-law that had been allowed to become obsolete or nearly so is invoked as establishing their own standard of conduct. By that a committee was to be appointed every six months "to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition." Of course liabilities as well as assets must be known to know the condition and, as this case shows, peculations may be concealed as well by a false understatement of liabilities as by a false show of assets. But the former is not the direction in which fraud would have been looked for, especially on the part of one who at the time of his principal abstractions was not in contact with the funds. A debtor hardly expects to have his liability understated. Some animals must have given at least one exhibition of dangerous propensities before the owner

(can be held. This fraud was a novelty in the way of swindling a bank so far as the knowledge of any experience had reached Cambridge before 1910. We are not prepared to reverse the finding of the master and the Circuit Court of Appeals that the directors should not be held answerable for taking the cashier's statement of liabilities to be

\*530

as correct as the \*statement of assets always was. If he had not been negligent without their knowledge it would have been. Their confidence seemed warranted by the semi-annual examinations by the Government examiner and they were encouraged in their belief that all was well by the president, whose responsibility, as executive officer; interest, as large stockholder and depositor; and knowledge, from long daily presence in the bank, were greater than theirs. They were not bound by virtue of the office gratuitously assumed by them to call in the pass books and compare them with the ledger, and until the event showed the possibility they hardly could have seen that their failure to look at the ledger opened a way to fraud. See *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Warner v. Penoyer*, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761. We are not laying down general principles, however, but confine our decision to the circumstances of the particular case.

[2] The position of the president is different. Practically he was the master of the situation. He was daily at the bank for hours, he had the deposit ledger in his hands at times and might have had it at any time. He had had hints and warnings in addition to those that we have mentioned, warnings that should not be magnified unduly, but still that taken with the auditor's report of 1903, the unexplained shortages, the suggestion of the teller, Cutting, in 1905, and the final seeming rapid decline in deposits, would have induced scrutiny but for an invincible repose upon the status quo. In 1908 one Fillmore learned that a package containing \$150 left with the bank for safe keeping was not to be found, told Dresser of the loss, wrote to him that he could but conclude that the package had been destroyed or removed by someone connected with the bank, and in later conversation said that it was evident that there was a thief in the bank. He added that he would advise the president to look after Coleman, that he believed he was living

\*531

at a pretty fast pace, and that he \*had pretty good authority for thinking that he was supporting a woman. In the same year or the year before, Coleman, whose pay was never more than twelve dollars a week, set up an automobile, as was known to Dresser and commented on unfavorably, to him. There was also some evidence of notice to Dresser that Coleman was dealing in copper stocks. In 1909 came the great and inadequately explained seeming shrinkage in the

deposits. No doubt plausible explanations of his conduct came from Coleman and the notice as to speculations may have been slight, but taking the whole story of the relations of the parties, we are not ready to say that the two courts below erred in finding that Dresser had been put upon his guard. However little the warnings may have pointed to the specific facts, had they been accepted they would have led to an examination of the depositors' ledger, a discovery of past and a prevention of future thefts.

[3, 4] We do not perceive any ground for applying to this case the limitations of liability *ex contractu* adverted to in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. In accepting the presidency Dresser must be taken to have contemplated responsibility for losses to the bank, whatever they were, if chargeable to his fault. Those that happened were chargeable to his fault, after he had warnings that should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen. We accept with hesitation the date of December 1, 1908, as the beginning of Dresser's liability, but think it reasonable that interest should be charged against his estate upon the sum found by the Circuit Court of Appeals to be due. It is a question of discretion, not of right, *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106; *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 539, 28 Sup. Ct. 367, 52 L. Ed. 606; but to the extent that the decree of the District Court was affirmed, *Kneeland v. American Loan & Trust Co.*, 138 U. S. 509, 11 Sup. Ct. 426, 34 L. Ed.

<sup>\*532</sup> 1052; *De La Rama v. De La Rama*, 241 U. S. 154, 159, 36 Sup. Ct. 518, 60 L. Ed. 932, Ann. Cas. 1917C, 411, it seems to us just upon all the circumstances that it should run until the receiver interposed a delay by his appeal to this Court. *The Scotland*, 118 U. S. 507, 520, 6 Sup. Ct. 1174, 30 L. Ed. 153. Upon this as upon the other points our decision is confined to the specific facts.

Decree modified by charging the estate of Dresser with interest from February 1, 1916, to June 1, 1918, upon the sum found to be due, and affirmed.

Mr. Justice McKENNA and Mr. Justice PITNEY dissent, upon the ground that not only the administrator of the president of the bank but the other directors ought to be held liable to the extent to which they were held by the District Court. 229 Fed. 772.

Mr. Justice VAN DEVANTER and Mr. Justice BRANDEIS took no part in the decision.

(251 U. S. 516)

## DUNBAR v. CITY OF NEW YORK.

(Argued Jan. 21, 1920. Decided March 1, 1920.)

No. 160.

1. CONSTITUTIONAL LAW  $\Leftrightarrow$  300—DUE PROCESS NOT DENIED BY STATUTE IMPOSING LIEN FOR WATER CHARGES THOUGH METERS WERE INSTALLED BY TENANT.

A provision of a charter making water charges a lien on the property to which the water is furnished, though the meters were installed at the request of a tenant, does not deprive the property owner of property without due process of law in violation of Const. U. S. Amend. 14, § 1.

2. COURTS  $\Leftrightarrow$  90(6)—RIGHTS CANNOT BE BASED ON ERRONEOUS DECISIONS.

No constitutional rights can be based on the error of prior decisions.

In Error to the Supreme Court of the State of New York.

Action by Cornelia A. Dunbar against the City of New York. A judgment for defendant was affirmed by the New York Appellate Division (177 App. Div. 647, 164 N. Y. Supp. 519) and Court of Appeals (223 N. Y. 597, 119 N. E. 1039), and defendant brings error. Affirmed.

Messrs. Harold G. Aron and Henry M. Wise, both of New York City, for plaintiff in error.

Mr. William Herbert King, of New York City, for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Plaintiff in error, to whom we shall refer as plaintiff, is the owner of certain real prop-

<sup>\*517</sup> erty and a building thereon \*in the city of New York which she leased to William Hills and William Hills, Jr., copartners doing business under the style of William Hills, Jr. The lessee covenanted to pay the charges for water which should be assessed against or imposed upon the building during the lease, and if not so paid it should be added to the rent then due or to become due.

The copartnership was subsequently adjudged bankrupt and at the time of the petition was indebted to the city in the sum of \$379.89 for water supplied as measured by two meters which had been installed in the property.

The city proved no claim in bankruptcy and a motion by plaintiff for an order directing the trustee to pay the water charges as a tax entitled to preference under the Bankruptcy Act (Comp. St. §§ 9585-9656) was denied on the ground that they were not a tax.

The plaintiff then brought this action to cancel the charge as a lien upon the property



and prayed an injunction against its enforcement.

[1] The contention against the charge of the city and the lien it asserts is that they are in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States and because they deprive plaintiff of property without due process of law.

Plaintiff's argument is somewhat difficult to state briefly. It commences by declaring that the question presented was left open in *Provident Institution v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102, which sustained the postponement of mortgages to the lien of water rents because it was said in that case that the complainant in the case knew what the law was when the mortgages were taken, and therefore "its own voluntary act, its own consent," was "an element in the transaction."

Counsel assumes that the case presented an instance of an express consent. In that counsel is mistaken. The consent was im-

\*518

plied from the fact that the law imposing the water rents preceded the mortgages. And so in the water charge in controversy it was imposed and made a lien on plaintiff's property by the charter of the city, and therefore the Supreme Court at the first instance and afterwards in Appellate Division, and we may assume by the Court of Appeals, decided that the consent of plaintiff could be implied, and any other conclusion would have been impossible. A city without water would be a desolate place and if plaintiff's property was in such situation it would partake of the desolation. And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

It is of no consequence, therefore, at whose request the meters were installed in the property. The meters, as observed by the Appellate Division, were "not the instrumentalities for furnishing the water"; they only registered its consumption. And, besides, the lease made by plaintiff contemplated the use of water by the lessees and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune, but it did not relieve the property, which we may say, would be unfit for human habitation if it could not get water.

[2] Counsel appear to rely on prior decisions of the court for relief of plaintiff; one in the Supreme Court, in which, it is said, a doubt was intimated whether a statute making a lessor liable for the personal debt of a lessee for water would be constitutional; and one in the Court of Appeals, which, to quote counsel, "having decided in 1910, three years prior to the inception of the charges for

which the lien is claimed, that the statute meant what the earlier case had suggested, the lien became unconstitutional," and plaintiff cannot be charged with an "implication of assent" to it. Without attempting an es-

\*519

timate of the contention it is enough to say that the decision in this case and other cases are opposed to the contention, and that besides no constitutional rights can be based on the error of prior decisions.

(252 U. S. 85)

# UNITED STATES v. A. SCHRADER'S SON, Inc.

(Argued Jan. 22 and 23, 1920. Decided March 1, 1920.)

No. 567.

MONOPOLIES  17(1)—MANUFACTURER, BINDING CUSTOMERS TO OBSERVE RESALE PRICES BY CONTRACTS, EXPRESS OR IMPLIED, VIOLATES LAW.

While a manufacturer may indicate his wishes concerning resale prices, and decline further dealings with those who fail to observe them, he may not, under Act July 2, 1890, § 1,<sup>1</sup> enter into agreements, whether express or implied from a course of dealing or other circumstances, with all customers in different states, binding them to observe fixed resale prices, thereby taking away dealers' control of their own affairs and destroying competition.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In Error to the District Court of the United States for the Northern District of Ohio.

Criminal prosecution by the United States against A. Schrader's Son, Incorporated. A demurrer to the indictment was sustained (264 Fed. 175), and the government brings error. Reversed and remanded.

Messrs. Henry S. Mitchell, of Washington, D. C., and Solicitor General Alex. C. King, of Atlanta, Ga., for the United States.

Mr. Frank M. Avery, of New York City, for defendant in error.

\*194

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Defendant in error, a New York corporation, manufactured at Brooklyn, under letters patent, valves, gauges and other accessories for use in connection with automobile tires, and regularly sold and shipped large quantities of these to manufacturers and jobbers throughout the United States. It was indicted in the District Court, Northern District of Ohio, for engaging in a combination rendered criminal by section 1 of the Sherman Act of July 2, 1890 (26 Stat. 209, c. 647<sup>1</sup>), which declares illegal "every con-



tract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." After interpreting the indictment as indicated by quotations from its opinion which follow, the District Court sustained a demurrer thereto, basing the judgment upon construction of that act (264 Fed. 175):

"The substantive allegations of this indictment are that defendant is engaged in manufacturing valves, valve parts, pneumatic pressure gauges, and various other accessories; that it sells and ships large quantities of such articles to tire manufacturers and jobbers in the Northern district of Ohio and throughout the United States; that these tire manufacturers and jobbers resell and reship large quantities of these products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) to the public, both within and without the respective states into which the products are shipped; that these acts have been committed within three years next preceding the presentation of this indictment and within this district; that the defend-

\*95

ant executed, and \*caused all the said tire manufacturers and jobbers to whom it sold its said products to execute with it, uniform contracts concerning resales of such products; that every manufacturer and jobber was informed by the defendant and well knew when executing such contracts that identical contracts were being executed and adhered to by the other manufacturers and jobbers; that these contracts thus executed purported to contain a grant of a license from the defendant to resell its said products at prices fixed by it to (a) jobbers and vehicle manufacturers similarly licensed, (b) retail dealers, and (c) the consuming public; that all these contracts provided (that the) [concerning] products thus sold to tire manufacturers and jobbers (provided) that they should not resell such products at prices other than those fixed by the defendant. Copies of these contracts are identified by exhibit numbers and attached to the indictment. It is further charged that the defendant furnished to the tire manufacturers and jobbers who entered into such contracts lists of uniform prices, such as are shown in said exhibits, which the defendant fixed for the resale of its said products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) the consuming public, respectively; and that the defendant uniformly refused to sell and ship its products to tire manufacturers and jobbers who did not enter into such contracts and adhere to the uniform resale prices fixed and listed by the defendant. Further, that tire manufacturers and jobbers in the Northern district of Ohio and throughout the United States uniformly resold defendant's products at uniform prices fixed by the defendant and uniformly refused to resell such products at lower prices, whereby competition was suppressed and the prices of such products to retail dealers and the consuming public were maintained and enhanced. \* \* \*

"Thus it will be observed that the contract,

\*96

combina<sup>a</sup>tion, or conspiracy charged comes merely to this: That the defendant has agreed, combined, or conspired with tire manufacturers and with jobbers by the selling or agreeing to sell valves, valve parts, pneumatic pressure gauges, and various accessories, with the fur-

ther understanding or agreement that in making resales thereof they will sell only at certain fixed prices. It will be further observed that the retailers, to whom the jobbers in ordinary course of trade would naturally sell rather than to the consuming public, and who in turn sell and distribute these articles to and among the ultimate consumers, are not included within the alleged combination or conspiracy. \* \* \*

"The so-called license agreements, exhibited with the indictment, are in my opinion, both in substance and effect, only selling agreements. The title to the valves, valve parts, pneumatic pressure gauges, and other automobile accessories passed to the so-called licensees and licensed jobbers."

The Court further said:

"Defendant urges that there is a manifest inconsistency between the reasoning, if not between the holdings, of these two cases [Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and United States v. Colgate Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992]; that if the basic principles announced in the latter case are to be taken in the ordinary sense imported by the language the present case falls within the Colgate Case, and that, properly construed, neither section 1 nor 2 of the Sherman Anti-Trust Law makes the defendant's conduct a crime. The Dr. Miles Medical Company Case, standing alone, would seem to require that this demurrer be overruled, and a holding that the Sherman Anti-Trust Law is violated and a crime committed, merely upon a showing of the making by defendant and two or more jobbers of the agreements set up in the indictment, certainly

\*97

if the jobbers were competitors in the \*same territory. That case has been frequently cited as establishing this proposition. \* \* \* The retailers are not in the present case included. They may compete freely with one another and may even give away the articles purchased by them. No restriction is imposed which prevents them from selling to the consumer at any price even though it be at a ruinous sacrifice and less than the price made to them by the jobber. Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the Dr. Miles Medical Company Case and the Colgate Company Case. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement. \* \* \*

"Granting the fundamental proposition stated in the Colgate Case, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal, and that he, of course, may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say

that he may do so by the subterfuges and devices set forth in the opinion and not violate the Sherman Anti-Trust Act; yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. Manifestly, therefore, the decision in the Dr. Miles Medical Case must rest upon some other ground than the mere fact that there

\*98

were \*agreements between the manufacturer and the wholesalers. \* \* \*

"The point, however, which I wish to emphasize is that the allegations of this indictment, not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of section 2 of the Sherman Anti-Trust Act and the last clause of section 2 of the Clayton Act, does not charge a crime under section 1 of the Sherman Anti-Trust Act as that act should be construed."

Our opinion in *United States v. Colgate Co.* declared quite plainly:

That upon a writ of error under the Criminal Appeals Act (34 Stat. 1246, c. 2564 [Comp. St. § 1704]) "we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision." That we were confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language, the meaning of the opinion below being the subject of serious controversy. The "defendant maintains that, looking at the whole opinion, it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who failed to maintain the same." "The position of the defendant is more nearly in accord with the whole opinion and must be accepted; and as counsel for the government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary."

And further:

"The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with

\*99

\*the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word, to preserve the right of freedom to trade. In the absence of any purpose

to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices, and it was treated "as alleging only recognition if the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same."

It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different states which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the

\*100

second, the parties \*are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the states.

The principles approved in *Dr. Miles Medical Co. v. Park & Sons Co.*, should have been applied. The judgment below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Mr. Justice CLARKE concurs in the result.  
Mr. Justice HOLMES and Mr. Justice BRANDEIS dissent.



(252 U. S. 109)

LEE v. CENTRAL OF GEORGIA RY. CO.  
et al.(Argued Jan. 16, 1920. Decided March 1,  
1920.)

No. 150.

1. COURTS  $\hookrightarrow$ 394(25)—JOINDER OF CAUSES AND PARTIES ARE MATTERS OF STATE LAW, THOUGH RIGHTS IN ISSUE ARE CREATED BY FEDERAL LAW.

Whether two causes of action may be joined in a single count, or whether two persons may be sued in a single count, are matters of pleading and practice, relating solely to the form of the remedy, and when they arise in state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by federal law.

2. COURTS  $\hookrightarrow$ 394(25)—MATTERS NOMINALLY OF PROCEDURE IN STATE COURT REVIEWABLE ONLY WHEN IN FACT MATTERS OF SUBSTANCE.

It is only when matters nominally of procedure are actually matters of substance, which affect a federal right, that the decision of the state court becomes subject to review by the federal Supreme Court.

3. MASTER AND SERVANT  $\hookrightarrow$ 311—FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT MODIFY RIGHTS OF EMPLOYÉES AGAINST EACH OTHER.

The federal Employers' Liability Act (Comp. St. §§ 8657-8665) does not modify in any respect rights of employés against one another existing at common law.

4. COURTS  $\hookrightarrow$ 394(25)—REFUSING TO PERMIT JOINDER OF RAILROAD COMPANY AND EMPLOYÉ IN A SINGLE COUNT DENIED NO RIGHT UNDER FEDERAL LAW.

The holding of a state court, that in an action under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) plaintiff could not sue the railroad company and its engineer jointly in a single count, abridged no substantive right under the federal law, especially where the state court had adopted the same rule in an action under the state Employers' Liability Act.

On Writ of Certiorari to the Court of Appeals of the State of Georgia.

Action by B. C. Lee against the Central of Georgia Railway Company and another. A judgment overruling demurrers to the petition was reversed by the Georgia Court of Appeals (21 Ga. App. 558, 94 S. E. 888), and plaintiff brings certiorari. Affirmed.

Messrs. Alexander A. Lawrence and William W. Osborne, both of Savannah, Ga., for petitioner.

Messrs. H. W. Johnson and T. M. Cunningham, Jr., both of Savannah, Ga., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

An injured employé brought an action in a

state court of Georgia jointly against a railroad and its engineer, and sought in a single count, which alleged concurring negligence, to recover damages from the company under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), and from the individual defendant under the common law. Each defendant filed a special demurrer on the ground of misjoinder of causes of action and misjoinder of parties defendant. The de-

\*110

\*murrers were overruled by the trial court. The Court of Appeals—an intermediate appellate court to which the case went on exceptions—certified to the Supreme Court of the state the question whether such joinder was permissible. It answered in the negative. 147 Ga. 428, 94 S. E. 558. Thereupon the Court of Appeals reversed the judgment of the trial court (21 Ga. App. 558, 94 S. E. 888), and certiorari to the Supreme Court of the state was refused. The plaintiff then applied to this court for a writ of certiorari on the ground that he had been denied rights conferred by federal law, and the writ was granted.

[1, 2] Whether two causes of action may be joined in a single count or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by federal law. *John v. Paullin*, 231 U. S. 583, 34 Sup. Ct. 178, 58 L. Ed. 381; *Nevada-California-Oregon Railway v. Burrus*, 244 U. S. 103, 37 Sup. Ct. 576, 61 L. Ed. 1019. This has been specifically held in cases arising under the federal Employers' Liability Act. *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505; *Atlantic Coast Line Railroad Co. v. Mims*, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476; *Louisville & Nashville Railroad Co. v. Holloway*, 246 U. S. 525, 38 Sup. Ct. 379, 62 L. Ed. 867. It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *New Orleans & North Eastern Railroad Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.

[3, 4] The federal Employers' Liability Act does not modify in any respect rights of employés against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employé with a cause of action against the employer in no way abridges any substantive

\*111

right of the plaintiff against the \*employer. The argument that plaintiff has been discrim-



inated against because he is an interstate employé is answered, if answer be necessary, by the fact that the Supreme Court of Georgia had applied the same rule in *Western & Atlantic R. R. et al. v. Smith*, 144 Ga. 737, 87 S. E. 1082 (22 Ga. App. 437, 96 S. E. 230), where it refused under the state Employers' Liability Act (Civ. Code 1910, § 2782 et seq.) to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the Supreme Court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defenses to which it is entitled by the federal law. For, as stated by its Supreme Court in this case (147 Ga. 428, 431, 94 S. E. 558, 560):

"If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, § 4512 [providing for verdicts in different amounts against the several defendants], is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by federal law. Cases upon which petitioner most strongly relies (*Southern Railway Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907; *Alabama Great Southern Railway Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *Southern Railway Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732) are inapplicable to the situation at bar.

Affirmed.

(252 U. S. 1)

JETT BROS. DISTILLING CO. v. CITY OF CARROLLTON.

(Argued Dec. 19, 1919. Decided March 1, 1920.)

No. 108.

1. COURTS ⇐394(18)—CLAIM OF DISCRIMINATION IN ASSESSMENT FOR TAXATION WILL NOT SUPPORT WRIT OF ERROR TO STATE COURT.

The claim of a distilling company that it was discriminated against, because distilled spirits were assessed for taxation at 100 per cent. of their fair cash value, while other property was assessed at 30 or 40 per cent. of its value, did not draw in question the validity of a statute or authority exercised under a state, on the ground of repugnancy to the Constitution, etc., of the United States, so as to support a writ of error to a state court, under Judi-

cial Code, § 237, as amended by Act Sept. 6, 1916, c. 448 (Comp. St. § 1214), since an objection to an exercise of authority under a statute, whose validity is not attacked, is not sufficient.

2. COURTS ⇐396(6)—FEDERAL QUESTION, RAISED ON REHEARING, WILL NOT WARRANT REVIEW.

A federal question, raised in a state court by a petition for rehearing, will not support proceedings in error in the federal Supreme Court, where no opinion was written on such motion.

In Error to the Court of Appeals of the State of Kentucky.

Suit by the City of Carrollton against the Jett Bros. Distilling Company. A judgment for plaintiff was affirmed by the Kentucky Court of Appeals (178 Ky. 561, 199 S. W. 37), and defendant brings error. Writ of error dismissed.

Mr. Helm Bruce, of Louisville, Ky., for plaintiff in error.

Mr. A. E. Stricklett, of Covington, Ky., for defendant in error.

\*3

\*Mr. Justice DAY delivered the opinion of the Court.

The city of Carrollton brought suit against Jett Bros. Distilling Company to recover balances alleged to be due as taxes upon distilled spirits belonging to the company held in a bonded warehouse in that city. The taxes sued for were those for the years 1907 to 1916, inclusive. It appears that during those years the city assessor undertook to assess for taxation the distilled spirits in the bonded warehouse and the city taxes were paid as thus assessed. This suit was brought to recover taxes for the above-mentioned years upon the theory that during that period the spirits should have been valued by the state board of valuation and assessment as provided by the statutes of Kentucky. Ky. St. §§ 4105, 4114. It was alleged that the valuation by the city assessor was without authority of law, by mistake, and for a much less sum than that fixed for each of said years by the state board. It was also alleged that the company had notice of the valuation fixed by the state board; that the city assessor was without authority to assess spirits in bonded warehouses; that the value fixed by him was an inconsiderable sum, and much less than that fixed by the state board in accordance with the Kentucky Statutes. The Distilling Company took issue upon the petition. It pleaded the original levies for the years in question and the payment of the taxes for each and all of the said years. It pleaded that the whisky which it was sought to tax under the new levy of 1915-1916 had been removed from the bonded warehouse of the company, and was no longer its proper-

ty, and that it could no longer protect itself as it could have done had the tax been levied while the spirits were in its possession.

\*4

\*In the nineteenth paragraph of the answer a defense was set up upon a ground of federal right under the Constitution. It was averred that during all the years covered by the amended petition it had been the rule, custom, habit, practice and system in the city of Carrollton to assess and cause to be assessed the real estate therein at an average of not more than 40 per cent. of its fair cash value, and to assess and cause to be assessed personal property in that city at an average of not more than 30 per cent. of its fair cash value; that the assessment made by the state board upon which taxes were sought to be recovered was made at 100 per cent. of the fair cash value of the whisky, and that the attempt of the plaintiff to collect the same, was in violation of the defendant's rights under the Constitution of the state of Kentucky and the Fourteenth Amendment of the Constitution of the United States.

The circuit court gave judgment in favor of the city for the amounts claimed under the new levy of 1916, giving credit for the amounts paid under the original levies for the preceding years. The company appealed to the Court of Appeals of Kentucky, where the judgment of the circuit court was affirmed. 178 Ky. 561, 199 S. W. 37. There was no other reference to the federal Constitution than that contained in the answer, so far as we have been able to discover, and the Court of Appeals dealt with the federal question, deemed to be before it, as follows (178 Ky. 566, 199 S. W. 39):

"It is further asserted that the recent cases of *Green v. Louisville & Interurban Railway Company* and *Green v. Louisville Railway Company*, decided by the Supreme Court of the United States and reported in 37 Supreme Court Reports, 673, uproot the contention that the act is constitutional, and hold that the state board of valuation, and the city assessor and board of supervisors, acting independently of

\*5

each other, and fixing different valuations \*of the same property, work a discrimination, inimical both to the federal and state constitutions. In this, however, appellant is in error. It must be borne in mind that complaint is only made of the assessment. The warehouseman had his remedy, in case of an excessive or unfair valuation, by appearing before the board of valuation and assessment at the time he received notice of the valuation fixed, and there make complaint as provided in section 4107, Kentucky Statutes. This appellant failed to do but acquiesced in the assessment by paying taxes both to the county and state on the valuation fixed by the state board. This being true, it cannot be heard to complain now."

[1] The case is brought here by the allowance of a writ of error. As the judgment was rendered after the Act of September 6, 1916, c. 448, 39 Stat. 726, Judicial Code, § 237

(Comp. St. § 1214), became effective, that act must determine the right to have a review in this court.

If the case can come here by writ of error, it is because there was drawn in question the validity of a statute, or authority, exercised under the state on the ground of their being repugnant to the Constitution, laws, or treaties of the United States. Before the petition for rehearing the contentions based upon constitutional grounds, by the plaintiff in error, were those embraced in the nineteenth paragraph of the answer, to which we have referred, and such as were deemed to be before the Court of Appeals of Kentucky in the portion of the opinion from which we have quoted. Neither the answer nor the opinion of the Court of Appeals shows that any claim under the federal Constitution was made assailing the validity of a statute of the state, or of an authority exercised under the state, on the ground of repugnancy to the federal Constitution. The answer, in the nineteenth paragraph, set up discrimination because of different valuations of the property of others,

\*6

claimed to violate \*rights secured by the Fourteenth Amendment to the Constitution of the United States. The opinion of the Court of Appeals likewise discussed the discriminatory action alleged by the plaintiff in error.

Drawing in question the validity of a statute or authority as the basis of appellate review has long been a subject of regulation in statutes of the United States, as we had occasion to point out in *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 450, 451, 33 Sup. Ct. 329, 57 L. Ed. 591. What is meant by the validity of a statute or authority was discussed by this court in *Baltimore & Potomac Railroad Co. v. Hopkins*, 130 U. S. 210, 9 Sup. Ct. 503, 32 L. Ed. 908, in which this court, speaking by Mr. Chief Justice Fuller, said:

"Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

And the Chief Justice added, upon the authority of *Millingar v. Hartupee*, 6 Wall. 258, 261, 262, 18 L. Ed. 829, that the word "authority" stands upon the same footing.

In order to give this court jurisdiction by writ of error under amended section 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority upon a claim that it is repugnant to the federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention. *Champion Lumber Co. v. Fisher*, 227 U. S. supra and cases cited.



[2] In the present case no such claim of the invalidity of a state statute or authority was raised in a manner requiring the court below to pass upon the question in disposing of the rights asserted. As we have said, whatever the effect of a petition for rehearing, it came

\*7

too late \*to make the overruling of it, in the absence of an opinion, the basis of review by writ of error. It follows that the allowance of the writ of error in the present case did not rest upon a decision in which was drawn in question the validity of a statute of the state or any authority exercised under it because of repugnancy to the federal Constitution, and the writ of error must be dismissed; and it is so ordered.

Dismissed.

(252 U. S. 147)

KANSAS CITY SOUTHERN RY. CO. v.  
UNITED STATES.

(Submitted Jan. 19, 1920. Decided. March 1,  
1920.)

No. 154.

1. POST OFFICE 21(4)—FAILURE TO IMPOSE FINES FOR DELAYS IN CAREYING MAILS NOT A CONSTRUCTION OF THE STATUTE PREVENTING THEIR IMPOSITION.

The failure of the Postmaster General for many years to impose fines or deductions for delays of less than 24 hours in the arrival of mail trains at their destination was not a construction by the Department of Rev. St. §§ 3962 and 4002 (Comp. St. §§ 7450, 7483), preventing such deductions, especially where before a contract to carry the mails was made the Department had announced that deductions would be made for delays of 15 minutes or more, and also in view of Act June 26, 1906, as to finding railroads for failure to comply with their contracts respecting the time of arrival and departure of mails.

2. POST OFFICE 21(4)—POSTMASTER GENERAL AUTHORIZED TO IMPOSE FINES FOR DELAY IN ARRIVAL OF MAIL TRAINS.

Under a contract to carry the mails upon the conditions prescribed by law and the regulations of the Post Office Department and providing that the adjustment should be subject to future orders and to fines and deductions, and under Rev. St. §§ 3962 and 4002 (Comp. St. §§ 7450, 7483) and Act June 26, 1906, as to deductions, and fines, the Postmaster General had authority to make deductions from a company's compensation for carrying mails on account of late arrivals of trains, and was not limited to delays of 24 hours in such arrival.

Appeal from the Court of Claims.

Claim by the Kansas City Southern Railway Company against the United States. The petition was dismissed (53 Ct. Cl. 630), and the claimant appeals. Affirmed.

\*148

\*Messrs. Alexander Britton and Evans Browne, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Spellacy, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

The appellant, in its petition, alleges: That in June, 1906, it entered into contracts with the Post Office Department to transport the mails over three designated routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service"; that during the fiscal year 1907 (the petition was not filed until December 19, 1912) the Department withheld from its stipulated pay \$3,355.48, "as a penalty imposed on account of late arrivals \* \* \* of trains, and failure to perform service on the \* \* \* mail routes"; and that such deductions were "unlawfully withheld." The prayer was for judgment for the full amount of the deductions, which are also designated in the record as fines or penalties. The petition was dismissed by the Court of Claims.

The appellant acquiesced in the deductions when they were made, accepted the reduced compensation without protest or objection, except in one instance, when the item complained of was adjusted to its satisfaction, and continued to perform the con-

\*149

tracts to the end of their \*four-year periods without complaint as to the reasonableness of the deductions involved. And thus it comes admitting that it freely entered into the contracts, fully performed them and accepted pay for such performance, but asking judgment for deductions which it avers were "unlawfully withheld" more than five years before the petition was filed.

The contracts were of the type, familiar in many reported cases, evidenced by "distance circulars," orders establishing the routes, specific agreements on the part of the contractor that it would perform the service "upon the conditions prescribed by law and the regulations of the Department applicable to railroad service" and that the "adjustment" should be "subject to future orders and to fines and deductions."

Among the applicable "conditions prescribed by law" were: R. S. 3962 (Comp. St. § 7450), that the Postmaster General might "make deductions from the pay of contractors, for failure to perform service according to contract, and impose fines upon them for other delinquencies"; R. S. 4002 (Comp. St. § 7483), authorizing contracts for the conveyance of the mails "with due frequency and speed"; and the act of June 26, 1906 (34 Stat. 467, 472), commanding the Postmaster General to require all railroads car-

rying mail to comply with the terms of their contracts "as to time of arrival and departure of mails" and "to impose and collect reasonable fines for delay" when not caused by unavoidable accidents or conditions.

It is conceded by the appellant that the Postmaster General had authority under R. S. 3962, to make deductions from the pay when a "trip was not performed" within 24 hours of the stipulated time for performance. But it is contended that he had no authority to make deductions or impose fines for shorter delays, and this is the sole question upon which this appeal is pursued into this court.

\*150

\*It is argued for the appellant: That power to make the disputed deductions must be found, if at all, in the provision of R. S. 3962, that the Postmaster General may "make deductions from the pay of contractors for failure to perform service according to contract, and impose fines upon them for other delinquencies"; that when the contracts were made long departmental construction had limited the failure to perform service, described in the act, to 24 hours of delay in the arrival of trains; and that failure, from 1872, when the section was enacted, to 1907, to impose fines or deductions for shorter delays, amounted to a construction by the Department that authority to impose fines upon contractors for delinquencies did not warrant deductions for failure to maintain train schedules when the delay was less than 24 hours.

[1] We need consider only this last contention, and in reply it is pointed out that the findings of fact show: That the amount and rates of compensation were determined by the Department for the various routes between the 10th and 26th of September, 1906, though effective as of the 1st day of the preceding July; that in October, 1905, the Postmaster General, "on account of the failure to observe schedules on routes or parts of routes," issued an order that deductions should be made, in sums stated, after December 31, 1905, when trains arrived at termini or junction points 15 or more minutes late, a designated number of times in a quarter; and that the act of Congress approved June 26, 1906, referred to, declared it to be the duty of the Postmaster General to impose and collect reasonable fines for failure of

railroads to comply with the terms of their contracts with respect to the time of arrival and departure of mails. This act was repealed in the following year, but the substance of it was immediately re-enacted in a more adaptable form.

Thus the appellant had notice before it

\*151

made the contracts under discussion that failure to maintain train schedules was regarded by Congress and the Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed there was authority under the customary contracts and the law to impose such deductions. The act of June 26, 1906, was not a grant of new power to the Postmaster General to impose such fines or deductions, but was an imperative direction to him to exercise the power which, it assumes, he already had for that purpose.

This action of Congress and of the Department is sufficient answer to the claim, if it were otherwise sound, that failure to exercise the power to impose fines for such a cause amounted to a departmental declaration that no such power existed.

[2] But the contention is not sound. Failure, within moderate limits, to maintain train schedules, may well have been regarded by the Postmaster General as a necessary evil to be tolerated and not to call for the exercise of his power to impose fines under the statute, when more flagrant neglect to maintain such schedules might very justly require him to exercise such authority in order to prevent intolerable public inconvenience. We cannot doubt that the contracts of the appellant, and the law which was a part of them, furnished ample authority for the action of the Department in this case and that omission to exercise such power did not make against the proper use of it when, in the judgment of the Postmaster General, adequate occasion for its use should arise.

We need not pursue the subject further. The principles involved are adequately and admirably discussed by the Court of Claims in its opinion rendered in the case of Louisville & Nashville R. R. Co. v. United States, 53 Ct. Cl. 238, upon authority of which this case was decided.

The judgment of the Court of Claims is affirmed.



(251 U. S. 466)

SCHAEFER v. UNITED STATES. VOGEL  
v. SAME. WERNER v. SAME. DAR-  
KOW v. SAME. LEMKE v. SAME.

(Argued Oct. 21, 1919. Decided March 1, 1920.)

Nos. 270-274.

1. JURY ⇐84—STATUTE AUTHORIZING SEVERAL DEFENDANTS TO BE TREATED AS ONE PARTY FOR PURPOSES OF CHALLENGES IS VALID.

Act March 3, 1911, § 287 (Comp. St. § 1264), under which several defendants may be treated as one party for the purpose of peremptory challenges, is constitutional.

2. CRIMINAL LAW ⇐822(1)—INSTRUCTION AS TO RIGHT OF JURY TO CALL ON THEIR OWN FUND OF GENERAL INFORMATION NOT ERRONEOUS IN CONNECTION WITH OTHER PORTIONS OF THE CHARGE.

Where the acts charged against defendants under the Espionage Act were the publication in newspapers printed and published in the German language of dispatches, which they altered so as to give them a meaning that they did not originally bear, a charge that, in passing on the question of the falsity of the publication, and the question "whether we are at war," and other questions which were in like manner a matter of public knowledge and general information, the jury had a right to call upon their fund of general information, *held* not erroneous, in connection with other portions of the charge.

3. CONSTITUTIONAL LAW ⇐90—RIGHT OF FREE SPEECH IS NOT ABSOLUTE.

Free speech is not an absolute right under the Constitution.

4. CRIMINAL LAW ⇐737(1)—JURY ALONE IS CHARGED WITH CONSIDERATION AND DECISION OF FACTS.

While it is sometimes the duty of the court to take a case from the jury, the jury alone is charged with the consideration and decision of the facts of the case, and its function has as definite a sanction as that of the court.

5. WAR ⇐4—ARTICLES HELD TO SUPPORT CONVICTION UNDER ESPIONAGE ACT.

Articles and editorials, published by defendants in newspapers printed and published in the German language, *held* to support convictions under the Espionage Act, as having a tendency to accomplish the forbidden purposes.

6. WAR ⇐4—PROOF AS TO EFFECT OF, OR PERSONS AFFECTED BY, ARTICLES NOT NECESSARY.

Where articles and editorials published by defendants had a tendency to accomplish the purposes forbidden by the Espionage Act, it was not necessary to show their effect or the persons affected.

Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

In Error to the District Court of the United States for the District of Pennsylvania.

Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke were convicted of offenses, under the Espionage

Act, and each brings error. Judgment reversed as to Schaefer and Vogel, and affirmed as to the other defendants.

For opinion below, see 254 Fed. 135. See, also, 248 Fed. 290.

\*467

\*Messrs. Wm. A. Gray and Henry John Nelson, both of Philadelphia, Pa., for plaintiffs in error.

Mr. Assistant Attorney General Stewart, for the United States.

\*468

\*Mr. Justice McKENNA delivered the opinion of the Court.

Indictment in nine counts under the Espionage Act. Preliminary to indicating the special offenses we may say that the indictment charges that at the dates mentioned therein the Philadelphia Tageblatt and the Philadelphia Sonntagsblatt were newspapers printed and published in the German language in Philadelphia by the Philadelphia Tageblatt Association, a Pennsylvania corporation of which defendants were officers; Peter Schaefer being president, Vogel treasurer, Werner chief editor, Darkow managing editor, and Lemke business manager.

That on the dates mentioned in the indictment the United States was at war with the Imperial German government and the defendants "knowingly, willfully, and unlawfully" "caused to be printed, published and circulated in and through" one or other of those newspapers false reports and statements of certain news items or dispatches purporting to be from foreign places, or otherwise violated the Espionage Act through editorials or other published matter.

In count 1 the charge is that the intent was "to promote the success of the enemies of the United States, to wit, the said Imperial German government."

In counts 2, 3, and 4 the charge is the obstruction of the "recruiting and enlistment service of the United States, to the injury of the United States."

In count 5 the purpose of publication is charged to be the making of false reports and statements with intent to promote the success of the enemies of the United States.

In counts 6, 7, and 8 there are charges of intent to like purpose.

Count 9 charges a conspiracy entered into by defendants to be executed through the

\*469

agency of the two \*newspapers for the purpose: (a) To make false reports and statements with intent to interfere with the military and naval operations and success of the United States and to promote the success of its enemies; (b) to cause insubordination, disloyalty, and mutiny in the military and naval forces of the United States; (c) to obstruct the recruiting and enlistment service of the United States. And there were specifications in support of the charges.

Demurrers were opposed to the indictment which stated in detail the insufficiency of the indictment to constitute offenses. The demurrers were overruled; the court considering that the grounds of attack upon the indictment could be raised at the trial.

The defendants were then arraigned and pleaded not guilty and when called for trial moved for a severance urging as the reason that the courts had ruled that defendants when tried jointly must join in "their challenge to jurors." Counsel in effect said they contested the ruling and considered the statute upon which it was based to be "in derogation of the individual's rights, guaranteed to him by the Constitution."

Other grounds for severance were urged, but the court denied the motion, and to the ruling each of the defendants excepted. In fortification of the motion for severance, at the selection of the jury, counsel, in succession for each defendant, challenged particular jurors peremptorily, expressing at the same time the acceptance by the other defendants of the challenged jurors. After 10 such challenges had been made counsel interposed a peremptory challenge to other jurors in behalf of all of the defendants, stating as reasons that they "collectively" were not "bound by what their codefendants may have done with respect to any particular juror, and that, therefore, they are still within their rights." The court denied the challenge, ruling that under the provisions of the act of Congress "all the defendants will be

\*470

deemed a single party, \*and 10 challenges having been exercised in the aggregate, the right of challenge is exhausted."

Defendants excepted and the trial proceeded resulting in a verdict as follows: Schaefer and Vogel guilty on count 9 only; Werner on counts 1, 2, 4, and 9; Darkow on 1, 3, 5, 6, and 9; Lemke on count 9 only.

Motions for arrest of judgment and for a new trial were made and overruled, and defendants were sentenced to various terms of imprisonment.

The case is here upon writ of error directly to the District Court as involving constitutional questions.

[1] It is conceded that the constitutionality of the Espionage Act has been sustained (*Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. 191, 63 L. Ed. 550), but the constitutionality of the Act of March 3, 1911, c. 231, § 287 (Comp. St. § 1264), by which several defendants may be treated as one party for the purpose of peremptory challenges, is attacked. Its constitutionality is established by *Stilson v. United States*, 250 U. S. 583, 40 Sup. Ct. 28, 63 L. Ed. 1154, decided November 10, 1919.

The other assignments of error are: (1) The government failed to prove the charge of making false statements as the same was

made in the indictment and that therefore the court erred in refusing to instruct the jury to acquit upon the counts charging the offense. (2) "In passing upon the question of falsity of the dispatches as published by appellants and in passing upon any other questions which are a matter of public knowledge and general information" the court erred in instructing the jury that "they had a right to call upon the fund of knowledge which was in their keeping." (3) The court erred in refusing to instruct the jury to render a verdict of not guilty upon all of the counts in case of each of the defendants.

Assignments 1 and 3 may be considered together. They both depend upon an apprecia-

\*471

tion of the evidence, \*although assignment 1 is more particular as to the offense charged. But neither can be discussed without a review of the evidence and a detailed estimation of its strength, direct and inferential. That, however, is impossible, as the evidence occupies over 300 pages of the record and counsel have not given us an analysis or compendium of it, but have thrust upon us a transcript of the stenographer's notes of the trial, which counsel for the government aptly says "presents" of the case "a picture of a certain sort, but it is a picture which is constantly out of focus, being either larger than the reality or smaller." However, we have accepted the labor it imposed, and have considered the parts of the evidence in their proper proportions and relation, and brought them to an intelligible focus, and are of opinion that the court rightfully refused the requested instructions, except as to the defendants Schaefer and Vogel. As to them we do not think that there was substantial evidence to sustain the conviction. They were acquitted, we have seen, of all the individual and active offenses, and found guilty only on the ninth count—the charge of conspiracy.

[2] The second assignment of error is somewhat confusedly expressed. It, however, presents an exception to the charge of the court as to what the jurors were entitled to consider as matters of public knowledge and general information. Counsel apparently urge against the charge that it submitted all the accusations of the indictment to the proof of the public knowledge and general information that the jurors possessed. The charge is not open to the contention, and as discussion is precluded except through a consideration of the instructions in their entirety, we answer the contention by a simple declaration of dissent from it based, however, we may say, on a consideration of the instructions as a whole not in fragments detached and isolated from their explanations and qualifica-

\*472

tions. Counsel at the trial attempted \*to assign to the charge the generality they now assert and it was rejected.



It is difficult to reach or consider the particulars of counsel's contention, the foundation of which seems to be that the indictment charged the falsification of the "dispatches," and that, therefore, the government must prove the falsification of them. What counsel mean by "falsification," is not easy to represent, they conceding there was proof that "the articles which were published differ from the articles in the papers from which they were copied," but contending that no evidence was offered of what was contained in the original dispatches of which the publications purported to be copies. And again counsel say:

"The falsity, as it has been called, which was proven against the defendants was that the articles which were published differ from the articles in the papers from which they were copied."

The charge and proof, therefore, were of alterations—giving the "dispatches" by a change or characterization a meaning that they did not originally bear—a meaning that weakened the spirit of recruiting and destroyed or lessened that zeal and animation necessary or helpful to raise and operate our armies in the then pending war. And there could be no more powerful or effective instruments of evil than two German newspapers organized and conducted as these papers were organized and conducted.

Such being the situation, and the defendants having testified in their own behalf, and having opportunity of explanation of the changes they made of the articles which they copied, the court instructed the jury as follows:

"In passing upon this question of falsity and in passing upon this question of intent and in passing upon, of course, the question of whether or not we are at war, you are permitted to use your general knowledge. I will withdraw the reference to the 'intent,' but in passing upon the question of the falsity of these publications,

\*473

in passing upon the question whether we are at war, and in passing upon any other questions which are in like manner a matter of public knowledge and of general information you have the right to call upon the fund of general information which is in your keeping."

The criticism counsel make of the charge is that—

"Without any proof whatsoever he [the judge] permitted them [the jury] to apply their general knowledge in determining whether the dispatches published by the defendants contained false statements."

Indeed, counsel go further, and insist that—

"The charge gave to the jury an unlimited right to use any general information at their disposal in reaching their verdict."

The charge itself refutes such sweeping characterization. Nor is it justified. The court said:

"The real offense with which these defendants are charged is in putting out these false statements. They received them from a source. That source purported to be the report of a dispatch, and the evidence in this case would seem to direct your minds in at least some of these instances, perhaps in many of them, to just where the report of the dispatch appeared. They took that report as it came to them, and the charge is, in plain words, that they garbled it, sometimes by adding something to it, and sometimes by leaving things out, and sometimes by a change of words. But the substantial thing which you are to pass upon is: Was the report or statement that they put out false? Was it willfully and knowingly false? Was it put out thus falsified with the intent to promote the success of the enemies of the United States."

In other words, the minds of the jurors were directed to the gist of the case, which was dispatches received and then changed to express falsehood, to the detriment of the success of the United States, and the fact and effect of change the jurors might judge of from the testimony as presented and "from the fund of information which was in" their "keeping"; that is, from the fact

\*474

of the source \*from which the dispatches were received, from the fact of war and what was necessary for its spirit and effective conduct, and how far a false cast to the dispatches received was depressing or detrimental to patriotic ardor. See *Stilson v. United States*, supra.

This disposes of the case on the exceptions which are argued. Exceptions 1 and 2 are specific, and we have discussed them. Exception 3 is general, and involves, not only the points we have discussed and selected by counsel for discussion, but involves, besides, every other objection to the instructions and the sufficiency of the evidence, in all the aspects they can be viewed and estimated.

And as being within its comprehension we are confronted with a contention that the indictment and conviction are violative of the freedom of speech and of the press protected by the Constitution of the United States. The contention is a serious one, and, in its justification, it is urged that the power of Congress to interfere with the freedom of speech and of the press must be judged by an exercise of reason on the circumstances. Therefore, in justice to the tribunal below, indeed to ourselves, we must give attention to the contention.

[3] It is not very susceptible of measurement. It is difficult to separate, in view of the contentions that are made, a judgment of the law from a judgment of conviction under the law, and keep free from confusing considerations. Free speech is not an absolute right, and when it or any right becomes

wrong by excess is somewhat elusive of definition. However, some admissions may be made. That freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in every one's convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law, and judgment must be summoned against the impulse that

\*475 might condemn a limitation without consideration of its propriety. But, notwithstanding this instant jealousy of any limitation of speech or of the press, there is adduced an instance of oppression by the government, and, it is said, to hold that publications such as those in this case—

"can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities."

If there be such practice, this case is not concerned with it. The assertion of its existence, therefore, we are not called upon to consider, as there is nothing before us to justify it. Therefore, putting it aside, and keeping free from exaggerations and alarms prompted by an imagination of improbable conditions, we bring this case, as it should be brought, like other criminal cases, to no other scrutiny or submission than to the sedate and guiding principles of criminal justice. And this was the effort of the trial court, and was impressed on the jury.

The court drew the attention of the jury to "the features which gave importance" to the case, but admonished it that they brought a challenge to a sense of duty and a sense of justice, and that while the enforcement of any law made a "strong call" upon court and jury, it could not—

"override the obligation of the other call, which is to make sure that no man is found guilty of a crime, unless the evidence points to his guilt with the degree of certainty which the law requires."

Again, and we quote the words of the court:

"No people is fit to be self-governed whose juries, chosen from among the great body of the people, cannot give due consideration to cases of this kind, and who cannot give to any defendant a fair and impartial trial, and render a just verdict. I know of no greater service an American citizen can perform for his country than to manifest by his attitude in cases of this

\*476 kind that we are a people who are governed by law, and who follow unswervingly that sense of justice which we should follow. Calling up just that spirit of justice, and breathing its very atmosphere, let us go to a consideration of the real merits of this case."

[4] Did the admonition fulfill the duty of the court, or should the court, as it is inti-

mated, have taken the case from the jury? To do so is sometimes the duty of a court, but it is to be remembered a jury is a tribunal constituted by law, as the court is, its function has as definite sanction as that of the court, and it alone is charged with the consideration and decision of the facts of a case. And the duty is of such value as to have been considered worthy of constitutional provision and safeguard. See *Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873.

If it be said this comment is but the expression of commonplaces, we reply that commonplaces are sometimes necessary to be brought forward, lest earnestness or interest disregard them, and urge too far the supervising power of the court, which, we repeat, is subordinate to that of the jury on questions of fact, and certainly "a rule of reason" cannot be asserted for it upon a mere difference in judgment. All the principles and practices of the law are the other way. May such rule be urged in an appellate court against the concurrence of court and jury in the trial court, or if there be division in the appellate court, for which view may a satisfaction of the rule be asserted? Passing by presumptions that may be challenged, an answer in this case may be left to the facts. But first as to the law.

The indictment is based on the Espionage Act, and that was addressed to the condition of war, and its restraints are not excessive nor ambiguous.<sup>1</sup> We need not enumerate

\*477 \*them. There were directed against conduct—speech or writings—that was designed to obstruct the recruitment or enlistment service, or to weaken or debase the spirit of our armies, causing them, it might be, to operate to defeat and the immeasurable horror and calamity of it.

But simple as the law is, perilous to the country as disobedience to it was, offenders developed, and when it was exerted against them challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. A curious spectacle was presented. That great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered Congress to

<sup>1</sup> "Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished. \* \* \* 40 Stat. 219.



declare war, and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech, upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge, and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it, including that in the case at bar. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173, decided November 10, 1919. That, however, though

\*478

in some respects retrospect, \*is a pertinent introduction to the facts of the pending case.

[5, 6] The charges of the indictment were against certain articles or editorials in the newspapers published by defendants in German and intended to be circulated in families and read by persons who understood that language. The articles were adapted to the situation, and, we may say, allusion and innuendo could be as effective as direct charge, and "coarse or heavy humor," when accompanied by sneering headlines and derision of America's efforts, could have evil influence. And such was the character of the article upon which count 3 of the indictment was based. It had the following headlines:

"Yankee Bluff."

"Professor Jenny Does Not Take the American Preparations for War Seriously."

"Ambassador Page Assures England That We Will Send Ten Million Men."

The following, with some other comments, was in the body of the article:

"The army of ten million and the hundred thousand airships, which were to annihilate Germany, have proved to be American boasts, which will not stand washing. It was worthy of note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words."

Coarse indeed, this was, and vulgar to us; but it was expected to produce, and it may be did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success,

and in hopelessness relax energy both in preparation and action. If it and the other articles, which we shall presently refer to,

\*479

\*had not that purpose, what purpose had they? Were they the mere expression of peevish discontent, aimless, vapid, and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose. They were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect or the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense—their "intent" and "attempt," for those are the words of the law—and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny.

The article was preceded by one July 4, 1917, headed "For the Fourth of July," in which it was declared that—

"The Fourth of July celebration, which has long been an empty formality, will this year become a miserable farce."

England was represented as the enemy of the United States, carrying a hostility watchful of opportunity from the time of the Revolution through all crises, until the United States "had become so strong that nothing could be undertaken against her." And further:

"The ruling classes of England have always despised and hated the United States, and today, while they flatter them, they still cherish the same feeling toward them."

The emphasis of a paragraph was given to the statement that—

"Under Wilson's régime the United States" had "sprung to the side of England as its savior in time of need. They provided it with means to carry on the war, and, when that wasn't enough, they sprang into the war themselves. History will some time pronounce its judgment upon this."

The aid so asserted to have been rendered to England by President Wilson was repre-

\*480

sented to have been in "opposition to the wishes of the people, expressed—

"by the unwillingness of their [the United States] young men to offer themselves as volunteers for the war. But it will not rest there. The call for peace will come from the masses, and will demand to be heard. And the sooner the better. No blood has been shed yet, no hate or bitterness has yet arisen against Germany, who has never done this country any harm, but

has sent millions of her sons for its upbuilding. The sooner the American people come to their senses and demand peace, the better and more honorable it will be for this country."

The animus of the article and the effect expected of it need no comment to display. It was followed, supplemented, we may say, and reinforced by another article July 7, 1917. It (the latter) had for headlines the words "Failure of Recruiting," and recruiting failed, was its representation, notwithstanding an "advertising campaign was worked at high pressure," and "all sorts of means were tried to stir up patriotism." Its further declaration was that—

"Germany was represented as a violator of all human rights and all international law, yet all in vain. Neither the resounding praises nor the obviously false accusations against Germany were of any avail. The recruits did not materialize."

The cause was represented to be:

"That the American who was not a coward" did "not care to allow himself to be shot to satisfy British lust for the mastery of the world," and "the people instinctively recognized and felt" that "the pro-British policy of the government is an error, which can bring nothing but injury upon this country."

It was then added that "the nation therefore" was doing the only thing it could still do, "since its desires were not consulted at first." It refused "to take part."

The purpose is manifest, however the statements of the article may be estimated, whether as criminal means, violations of law, or the

\*481

exercise of free speech and of the press, \*and its statements were deliberate and willfully false; the purpose being to represent that the war was not demanded by the people but was the result of the machinations of executive power, and thus to arouse resentment to it and what it would demand of ardor and effort. In final comment we may say that the article in effect justified the German aggressions.

We do not deem it necessary to adduce the other charges of the indictment. We may, however, refer to the plausibility of the excuse of the alteration of Senator La Follette's speech, and remark that it disappears when the speech is considered in connection with the articles that preceded and followed it. The alterations were, it is true, of two words only, but words of different import than those the Senator used. The Senator urged that the burden of taxation made necessary by the war be imposed upon those who might profit by the war, in order to relieve those who might suffer by it and be brought to "bread lines." The article changed the words to "bread riots"; that is, changed the expression of acceptance of what might come as

a consequence of the war to turbulent resistance to it, and thus giving the article the character of the others, with a definite illustration of the opposition to the war by a Senator and his prophecy of a riotous protest by the people. It will be recalled that in other articles the antagonism of the people to the war was declared, and in one of them it was said that the war was commenced "under Wilson's régime" and "without their [the people's] consent."

In conclusion, we may add that there are in the record what are called "intent" articles, which supplement and emphasize the charges of the indictment, and, it is to be remembered, that defendants were witnesses, and had the opportunity of explanation, and to preclude any misapprehension of the German originals or defect in their translation. And the jury could judge of the defendants by their presence.

\*482

\*We have not deemed it necessary to consider the articles commented on with reference to the verdicts; the Abrams Case has made it unnecessary. On any count of which any defendant was convicted he could have been sentenced to 20 years' imprisonment. The highest sentence on any defendant was five years.

Further comment is unnecessary, and our conclusion is that the judgment must be affirmed as to Werner, Darkow, and Lemke but reversed as to Schaefer and Vogel; as to them the case is remanded for further proceedings in accordance with this opinion.

So ordered.

Mr. Justice BRANDEIS delivered the following [dissenting] opinion, in which Mr. Justice HOLMES concurred:

With the opinion and decision of this court, reversing the judgment against Schaefer and Vogel on the ground that there was no evidence legally connecting them with the publication, I concur fully. But I am of opinion that the judgments against the other three defendants should also be reversed, because either the demurrers to the several counts should have been sustained or a verdict should have been directed for each defendant on all of the counts.

The extent to which Congress may, under the Constitution, interfere with free speech, was in *Schenck v. United States*, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249 (63 L. Ed. 470), declared by a unanimous court to be this:

"The question in every case is whether the words \* \* \* are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-



meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be

\*483

applied correctly only by the \*exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree; and because it is a question of degree the field in which the jury may exercise its judgment is necessarily a wide one. But its field is not unlimited. The trial provided for is one by judge and jury, and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and, if he fails to do so, it is the duty of the appellate court to correct the error. In my opinion, no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger, either that they would obstruct recruiting or that they would promote the success of the enemies of the United States. That they could have interfered with the military or naval forces of the United States or have caused insubordination, disloyalty, mutiny, or refusal of duty in its military or naval services was not even suggested; and there was no evidence of conspiracy, except the co-operation of editors and business manager in issuing the publications complained of.

The nature and possible effect of a writing cannot be properly determined by culling here and there a sentence and presenting it separated from the context. In making such determination, it should be read as a whole; at least, if it is short, like these

\*484

news items and editorials. Sometimes it is necessary to consider, in connection with it, other evidence which may enlarge or otherwise control its meaning, or which may show that it was circulated under circumstances which gave it a peculiar significance or effect. But no such evidence was introduced by the government. The writings here in question must speak for themselves. Fifteen publications were set forth in the indictment; and others were introduced in evidence. To reproduce all of them would unduly prolong this opinion. Four are selected which will illustrate the several contentions of the government. That at least three

of these four were deemed by it of special importance is shown by the fact that each of the three was made the subject of a separate count.

First. There were convictions on three counts of willfully obstructing the recruiting and enlistment service. The conviction of the news editor of so obstructing rested wholly upon his having inserted the following reprint from a Berlin paper in the *Tageblatt*:

Yankee Bluff.

"Professor Jenny Does Not Take the American Preparations for War Seriously.

"Ambassador Paige Assures England That We Will Send Ten Million Men.

"London, Aug. 5.—Ambassador Paige followed Lloyd George at Guild Hall in Plymouth, with a great speech. He declared there that the differences between England and the United States in former times were only of a superficial nature, and that both peoples are now united inseparably, to fight for freedom and against the Hydra of militarism. He assures his hearers that the United States is ready for all sacrifices in order to end the war victoriously, and that, if necessary, it will send 10,000,000 men to France."

"Berlin, Aug. 5.—In the *Tägliche Rundschau*, Professor Jenny writes under the title 'Ameri-

\*485

canism' as \*follows: Americans think in exaggerations and talk in superlatives. Even Ambassador Andrew White in his *Memoirs* falls into superlatives in comparatively insignificant cases. He speaks of them as the most important events of his life, and maintains that certain people have made an indelible impression on him, whom others consider to be ordinary, average men.

"The army of 10,000,000 men has dwindled to a voluntary army of 120,000; while the new conscripted army of 565,000 will not even be ready to begin drilling for the front in six months. The 100,000 air ships were reduced to 20,000, and then to 3,000, which the Americans hope to have ready for next summer, if they find the right model for them. As for the thousands of ships that were to be sent across the ocean, America, six months after the declaration of war, has not yet decided whether they are to be wood or steel ships; so far not even the keel of one ship has been laid. It amounts to this: That now, when the Americans can scrape some tonnage together, the troops are not ready, and when they have the troops ready, the tonnage will not be available.

"The army of 10,000,000 and the 100,000 airships which were to annihilate Germany have proved to be American boasts, which will not stand washing. It is worthy to note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words.

"But some fine day, if they do not stop their boasting and bluffing, it might happen to them that they get the lockjaw, for which there is no better relief than a good box on the ear.

Moreover, it is not to be assumed that the Americans are really in earnest with the war. No one would be surprised if they found a thousand and one excuses for taking no active part in the European War."

\*486

\*It is not apparent on a reading of this article—which is not unlike many reprints from the press of Germany to which our patriotic societies gave circulation in order to arouse the American fighting spirit—how it could rationally be held to tend even remotely or indirectly to obstruct recruiting. But as this court has declared, and as Professor Chafee has shown in his "Freedom of Speech in War Time," 32 Harvard Law Review, 932, 963, the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger. Certainly men, judging in calmness and with this test presented to them, could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting. Compare *United States v. Hall*, (D. C.) 248 Fed. 150; *United States v. Schutte* (D. C.) 252 Fed. 212; *Von Bank v. United States*, 253 Fed. 641, 165 C. C. A. 267; *Balbas v. United States*, 257 Fed. 17, 168 C. C. A. 229; *Sandberg v. United States*, 257 Fed. 643, 168 C. C. A. 593; *Kamman v. United States* (C. C. A.) 259 Fed. 192; *Wolf v. United States* (C. C. A.) 259 Fed. 388, 391, 392.

Second. There were convictions on three counts of willfully conveying false reports and statements with intent to promote the success of the enemies of the United States. The *Tageblatt*, like many of the smaller newspapers, was without a foreign or a national news service of any kind, and did not purport to have any. It took such news usually from items appearing in some other paper theretofore published in the German or the English language. It did not in any way indicate the source of its news. The item, if taken from the English press, was of course translated. Sometimes it was copied in full, sometimes in part only, and sometimes it was rewritten, or editorial comment was added. The government did not attempt to prove that any statement made in any of the news items published in the *Tageblatt* was false in fact. Its evidence,

\*487

\*under each count, was limited to showing that the item as published therein varied in some particular from the item as it appeared in the paper from which it had been copied; and no attempt was made to prove the original dispatch to the latter paper. The government contended that solely because of variation from the item copied it was a false report, although the item in the *Tageblatt* did not purport to reproduce an item from another paper, and in no way indicated the source of the news. Each of the

three items following illustrates a different method by which the variation was effected:

I. The publication for which the news editor was convicted on the fifth count by reason of an addition to the item copied:

(The translation of the *Tageblatt* item as set forth in the indictment:)

"Further Economies.

"Amsterdam, September 2.—It has been reported here that permission to export the wheat and flour on the ships held in New York has been refused. Information to this effect is contained in an official proclamation of the latest cut in bread rations and of the need for economy which has reached the civil authorities: This document says: 'We know now with certainty that we cannot count upon the import of breadstuffs from America and that we must strive to make our own provisions suffice. In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded.'"

(The original *Tageblatt* item as set forth in the indictment:)

Weitere Einschränkungen.

Amsterdam, 2. Sept.—Es wird hier gemeldet, dass der Export von Weizen und Mehl auf den in New York zurückgehaltenen Schiffen verweigert wurde. Eine diesbezügliche Mittheilung ist in einer amtlichen Erklärung der jüngsten Brotrationen-Verringerung und der Aufforderung zur Einschränkung enthalten, welche den Gemeindebehörden zugeht. In derselben heisst es: "Wir wissen nun bestimmt, dass wir auf die Einfuhr von Brotgetreide aus Amerika nicht rechnen können, und dass wir uns bemühen müssen, mit den eigenen Vorräthen auszukommen."—In eingeweihten Kreisen heisst es, dass man auf den neuen Vorschlag Amerikas unter keinen Umständen eingehen und das Getreide eher verfaulen lassen wird, als die Schiffe auszuladen.

\*488

\*The falsification charged is said to consist in having added to the dispatch which was copied from the *Staatszeitung* the words:

"In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded."

But it is obvious, upon comparing the English translation with the German original, that the defendant did no such thing. What occurred was this: The sentence referred to was not made a part of the dispatch in the *Tageblatt*. It followed the dispatch; it was not within the quotation marks, and was separated from it by a dash—a usual method of indicating that what follows is comment or an addition made by the editor. In the English translation, as set forth in the indictment, this sentence, through some inadvertence of the government's translator or draftsman, was included as part of the dispatch and brought with the quotation therein. Evidently both the jury and the trial judge failed to examine the German original.

2. One of the publications for which the news editor was convicted on the first count because of an omission from the item copied:



**"Ready for the Fray?"**

"St. Petersburg, September 7th.—The Russian Baltic Fleet will defend Kronstadt and Reval, and through them the Russian capital itself. The commanders of the two fortresses have made this report to the provisional government. A large part of the Baltic fleet was under control of the Maximalists, who hitherto have opposed Kerensky. The commanders of Sveaborg and Helsingfors have also telegraphed their assurance to the government that the Baltic fleet has expressed its willingness to offer desperate resistance, in case the Germans should make a naval attack upon the strongholds between Riga and the capital.

**"Investigation of the Fall of Riga.**

"The Russians devastated the land through

\*489

which they \*retreated from Riga, in order to impede the German advance. Roads were broken up, bridges destroyed and provisions burned. A special commission has been set up by Premier Kerensky to investigate the fall of Riga. As far as reports have so far been permitted to appear, it is established that only two regiments gave up their positions without fighting, and the others offered the attacking Germans bold resistance. The retreat was carried out in an orderly manner, in spite of pursuit by the German armies. The first of these, advancing along the coast in the region of Dunaburg, is apparently endeavoring to reach Berna, on the Gulf of Riga. The second German army is pressing along the Pskoff road to execute a turning movement, while the third is energetically pushing in a northeasterly direction against Ostroff. The Germans are showing signs of nervousness in advancing through this marshy lake-strewn country, which are increased by the Russian resistance.'

The falsification here is said to consist in the omission from the end of the first paragraph of the following sentence which appeared in the paper from which the item was taken:

"From this it can be concluded that the fall of Riga has united the opposing political factions in Russia."

3. The publication for which the news editor was convicted on the sixth count, because of the change of a word in the item copied:

**"War of the Rich.**

"Senator La Follette Thinks They Ought Not to Make a Cent of Profit.

**"Hot Fight in the Senate Over Increased Taxation of War Profits.**

"Washington, August 21.—Taxation of riches in such a measure that the burdens of the cost of the war will be taken from the shoulders of the poor man was recommended today in the Senate by Senator La Follette in a long speech.

\*490

He declared that the proposed two billion \*dollar bill as drawn up in the Senate's Committee on Financial Affairs is impractical because it covers less than seventeen per cent. of the war expenses of the first year and from this would \*result the necessity of issuing bonds for billions of dollars. Bonds, however, mean the same as an increased cost of living, and one of

the consequences would be that next winter bread riots could be expected in the big cities. He recommended the acceptance of amendments by which further taxation of large incomes and big war profits would be effected, which would bring the total amount of the bill to about \$3,500,000,000.

"Senator La Follette declared that wealth had never, in any war, offered itself on the altar of patriotism. He attacked the proposed issue of bonds and prophesied that the Liberty Bonds would eventually find their way into the hands of the rich, if they had not already done so. 'But,' he continued, 'this is not all, for war, and principally the sale of bonds, leads inevitably to inflation. This raises prices and through that the cost of living for the great mass of people is raised. Reason and experience teach us that the policy of financing a war for the most part by borrowing the necessary money, is in itself one of the worst financial burdens that war imposes upon men. But wealth is always a powerful factor in the Government. It fattens on war loans and war contracts as well as on speculation, which is not wanting in time of war. Upon these grounds the rich are always in favor of war, and when they have succeeded in bringing on a war, they are often powerful enough with ministers of war and parliaments and congresses to force the maximum of loans and to reduce taxation to a minimum by every possible intrigue and argument.

"And that is the case with us in this war. Within thirty days after the declaration of war wealth had precipitated us into bond issues of unheard of size. Morgan came to the city, the

\*491

press urged it, the administration \*commanded it, and Congress authorized the issue of five billions of untaxable Government bonds and two billions of interest bearing Treasury notes.'

"Senator La Follette attacked the program of the administration under which a new tax measure will be introduced next winter. 'Of what use is the postponement?' he asked, 'Whose interest is served if taxes on incomes and war profits are kept down and the masses are delivered over to the money lenders as security for an enormous and wickedly disproportionate issue of bonds?' He insisted that the policy of financing the war should at once be decided upon.

"To-day the way is clear,' he explained, 'hesitation to provide now for heavy taxes would not be a mistake, it would be something worse.'

"Senator La Follette reviewed the financial history of previous American wars. 'We must not repeat such mistakes,' he said, 'it would be blind madness if we did not learn from the mistakes that were made in previous wars. A mistake that we make now may be fatal. It would certainly cost us untold millions of dollars and thousands upon thousands of lives, as by it we would prolong the war unnecessarily.

"As long as one man can be found who makes war profits, I am in favor of taking away in taxes such part of those profits as the Government requires, and the Government needs the whole of such profits before adding a penny to the taxation of people who are already staggering under heavy burdens by reason of the higher prices occasioned by the war. This may be a new principle in war financing, but it is the least that one can do for the mass of the people, and it is considerably less than simple justice would demand for them.

"The great mass of the people bear the costs of war, although they may not be directly taxed one dollar. The great mass of the people pay

\*492

in higher prices and pro-longed hours of labor. They pay in service, not alone on the battle field, but whenever men and women work hard all day long. But more than all this, they pay the cost of war with their blood, and their lives, and what is the greatest sacrifice of all, with the blood and lives of their loved ones.

"If bread lines are a familiar sight in every city in the land, as they undoubtedly will be if the present prices of the most necessary supplies for living hold firm during the coming winter, if cold and hunger become daily guests with thousands of families, who, until now, have only known comfort, a condition which is certain to come about during the coming winter months, if no help against the present level of prices can be found, then it is my opinion that the members of this Congress will do little enough if they come to realize that they are adding to the privations and pains of the mass of the people if they hesitate to place even a fairly moderate portion of the financial burden upon the rich."

Falsification is charged solely because the word "Brot-riots" (translated as "bread-riots") was used in the eleventh line of the article, instead of the word "Brodreihen" (translated as "bread-lines").

The act punishes the willful making and conveying of "false reports and false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." Congress sought thereby to protect the American people from being willfully misled to the detriment of their cause by one actuated by the intention to further the cause of the enemy. Willfully untrue statements which might mislead the people as to the financial condition of the government and thereby embarrass it; as to the adequacy of the preparations for war or the support of the forces; as to the sufficiency of the food supply; or willfully untrue statements or reports of military opera-

\*493

tions \*which might mislead public opinion as to the competency of the army and navy or its leader (see "The Relation Between the Army and the Press in War Time," War College Publication, 1916); or willfully untrue statements or reports which might mislead officials in the execution of the law, or military authorities in the disposition of the forces—such is the kind of false statement, and the only kind, which, under any rational construction, is made criminal by the act. Could the military and naval forces of the United States conceivably have been interfered with, or the success of the enemy conceivably have been promoted by, any of the three publications set forth above? Surely, neither the addition to the first nor the omission from the second constituted the making of a false statement or report. The mis-translation of "breadlines" in one passage of

the third, if it can be deemed a false report, obviously could not have promoted the success of our enemies. The other publications set out in the indictment were likewise impotent to produce the evil against which the statute aimed.

Darkow, the news editor, and Werner, the editor, were each sentenced to five years in the penitentiary; Lemke, the business manager, to two years. The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men, not merely for disloyal acts, but for a disloyal heart: provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive trea-

\*494

son.<sup>2</sup> To hold that such harmless additions to or omissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution, will doubtless discourage criticism of the policies of the government.

<sup>2</sup> The presiding judge in charging the jury said of the act: " \* \* \* Its general purpose is to protect our military strength and efficiency to protect ourselves against anything which would promote the success of our enemies by undermining our morale, lessening our will to win, or as it is generally expressed, our will to conquer. \* \* \*

creating divisions among our people. \* \* \*

"These acts which are prohibited are treasonable in the sense in which that word is used, in the common speech of the people. Indeed, they may constitute legal treason as defined in some jurisdictions, but they are not treason against the United States, for the simple reason that there is a provision in our Constitution (which of course, the acts of Congress follow), that treason against the United States—you will observe that it does not say 'treason generally,' but treason against the United States, shall consist only in making war upon them, or in adhering to their enemies, giving them aid and comfort, and there is another provision to the effect that no person shall be convicted of the crime of treason unless there are two witnesses to the same overt act, making, as you will see, it perfectly clear that mere words, whether published or not, as long as they are mere words, do not constitute the crime of treason, but they must be words uttered and published under such circumstances as to become deeds or acts in themselves, as 'words' may be. So that words, unless there is something to which they may attach and unless the direct, natural, and reasonably to be expected consequences of them would be to aid the enemy, do not constitute the crime of treason. Every man will observe, however, that even mere words may be fraught with consequences which although too remote to constitute the crime of treason, may nevertheless be words which are fraught with most awful consequences, \* \* \*

and that therefore it is properly within the province of the law to prohibit \* \* \* and make it a crime even to utter them. This is in substance what the law does. Congress could not call some mere words treason, because the Constitution prohibits it, but there is no constitutional limitation on the power of Congress to declare those things a crime against the law which Congress has done in this act. \* \* \*



To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities. Nor will this grave

\*495

danger end with the passing of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.

Mr. Justice CLARKE, dissenting.

On a single indictment, containing nine counts, five men, Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow and Herman Lemke, were convicted and sentenced to the penitentiary for printing seventeen articles in a German language newspaper, published at Philadelphia, between June 24 and September 17, 1917.

Schaefer was president and Vogel was treasurer of the company which published the paper, but their entire time was given to the service of labor unions, which had loaned money to the company, and they were given these official positions for the purpose of enabling them to keep informed as to its business progress and the disposition of its earnings.

All the members of the court agree that there was no substantial evidence that Schaefer or Vogel were in any respect responsible for the publications complained of and that as to them the judgment must be reversed.

In this conclusion I cordially concur, but I go further and am clear that a similar reversal should be entered as to Herman Lemke, who was convicted, as Schaefer and Vogel were, on only one of the nine counts of the indictment.

Lemke was given the sounding title of "business manager," but, as a matter of fact,

\*496

he was a mere bookkeeper, \*of a small business, with very limited authority. The newspaper led a precarious financial existence and Lemke's duties were restricted to making out and collecting bills for advertising and circulation, to paying some bills and to turning over the remainder of the money, if any remained, to the treasurer, Vogel. Lemke himself and two or three other witnesses testified that he had nothing whatever to do with deciding what should be published in the newspaper, and that he never wrote for it excepting that when a reporter was ill he occasionally reported a concert. There was no evidence to the contrary.

On such a record it is very clear that a

man holding such a position as Lemke held, could not, and did not, have anything to do with determining what should be published in the paper. He had no more to do with the policy of the paper than a porter would have with determining the policy of a railroad company. In my judgment the failure of proof as to Lemke was as complete as it was as to Schaefer and Vogel and I cannot share in permitting him to be imprisoned in the penitentiary for a year for publications which he was powerless either to authorize or prevent.

A different case is made against Werner and Darkow. Werner was a writer of political editorials for the paper, and Darkow was the news editor. Werner was found guilty on four counts and not guilty on five. Darkow was found guilty on five counts and not guilty on four.

Two of the articles written, or caused to be published, by Werner, and one, or perhaps two, of those caused to be published by Darkow, were of a character such that they might have been fairly convicted of violating the act under which they were indicted, but none of these articles was included in count 1, and only one of them was included in count 9, and with respect to this one article in count 9 Werner was found not guilty when charged with its publication in count

\*497

3. The charge of the court did \*not distinguish between these really offending publications and the many innocent ones the publication of which was charged to be criminal, with the result that it failed to give such direction to the deliberations of the jury as I think every person accused of crime is entitled to have given.

The denial of separate motions to instruct the jury to render a verdict of not guilty as to Werner and Darkow on the first and ninth counts seems to me to constitute error so fundamental and pervasive as to render the entire trial unfair and unjust, to a degree which requires the granting of a new trial to each of them.

I shall state my reasons for this conclusion as briefly as I may.

The first count charges that the defendants—

"knowingly, willfully and unlawfully made and conveyed false reports and statements, with intent to promote the success of the enemy of the United States, to wit, the Imperial German government."

The indictment and the record in general make it very plain that the district attorney, in framing the indictment, and during the trial, believed that the statute prohibiting the making and conveying of a false report and statement would be violated by the publication of any article which had been published elsewhere if, in the publication, it was changed, either by addition or omission,

and this without any proof that the original publication was true and the second publication false, and seemingly without regard to whether or not the publication had any tendency to promote the success of the enemy. The trial court accepted this construction of the statute and submitted the first count to the jury on this theory of the law.

I cannot doubt that this was gravely erroneous, for the real purpose of the statute is to punish, published, not suppressed, reports and statements, whether original or

\*498

\*copies, made with the intent to promote the success, and which were of a nature reasonably likely to promote the success, of the enemy of the United States—by discouraging our own people or encouraging the enemy.

The first of the 13 false reports, which it is charged in the first count were published, is typical of the others, and will sufficiently explain my position.

It purported to be a dispatch from London and translated reads as follows:

"The Crisis.

"Is Advancing in Russia with Rapid Strides. The Coalition Government Will Probably Not Last Long.

"Its Position in Foreign Affairs is Condemned.

"London, June 23.—The Petrograd correspondent of the Chronicle telegraphs today that a great crisis is in progress in Russia. (By that he means apparently that the unstable and weak coalition government will soon be got rid of. It seems to obey unwillingly the instructions of the Workmen's and Soldiers' Council to request the allies to revise their war aims. The workmen will not stand for this much longer. It is highly significant too that not a word has been reported for four days about the great general congress of the Workmen's and Soldiers' delegates; apparently because its behavior does not please the allies.)

"The correspondent of the Chronicle quotes an extract from Maxim Gorky's newspaper 'New Life,' which says that people all over the world are to understand that Russia rejects the aggressive war aims of the allies. The correspondent sees a sign in this that the socialists of Russia will not wait much longer."

Obviously there is nothing in this, as published, which could either discourage Americans or encourage the German enemy, and the indictment does not claim that there is. That which the indictment charges makes the publication criminally false is that there was

\*499

omitted from it "a \*proposal by Maxim Gorky that Russia wage a separate war against Germany." Thus the charge is that the crime consisted not in publishing something which tended to encourage German enemies, but in omitting to publish something which it is conceived might have discouraged them. It is not charged that what was printed was harmful, but that something which was unfavorable to Germany was not published.

This is characteristic of all but 2 of the

13 articles in the first count, and to these, additions were made so inconsequential as in my judgment not to deserve notice.

It seems to me very clear that the statute could not be violated by publishing reports and statements harmless in themselves and which were not shown to be false, merely because they had been published in a different form in another paper—and this is the extent to which the proof in this case goes as to all of the publications complained of in the first count. Without more discussion, I am so clear that the requested instruction for the defendants Werner and Darkow as to the first count should have been granted, that I think the refusal of it entitles them to a new trial.

The ninth count consists of a charge of conspiracy on the part of the entire five defendants to willfully make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States, with willfully causing and attempting to cause insubordination, disloyalty and mutiny in the military and naval forces of the United States, and with willfully obstructing the recruiting and enlisting service of the United States by the publication of various articles referred to, but not quoted, in the indictment.

With a single exception these articles are the same as those incorporated in the first count and this exception purported to be a

\*500

dispatch from the Hague, giving the \*reasons for the unrest in Germany, from which it is charged there was omitted a statement that one of the reasons for such unrest was the failure of the submarine campaign carried on by the German government. Even in this ninth count it is not charged that the publications as actually made were harmful but it proceeds as does the first count, upon the implication that they might have been more discouraging than they were to the German enemy if the omitted statements had been incorporated into them, and that for this reason they violated the statute. In other words, it comes to this, that the ninth count charges as criminal, not a conspiracy to publish the articles complained of, which were innocent, but a conspiracy to suppress certain statements which were published in other newspapers in connection with or as a part of the published articles and which it is argued might have been harmful to the German cause if they had been published. It is impossible for me to think that the statute could be violated in any such manner.

It was clearly proved that the newspaper was so poor financially that it was not able to have telegraphic service of any character and, morning paper that it was, it filled its news columns with clippings from the evening papers of the night before and from early editions of the morning papers when it could procure them before its hour for going to press. It did not print nearly as many



columns as the newspapers from which it obtained its news and for this reason it was necessarily obliged to cut and condense both headlines and the body of the articles. In several of the instances complained of these exigencies of publication plainly caused the omissions complained of.

Convinced as I am that the requested instructions to the jury that Werner and Dar-kow could not be found guilty on the first and ninth counts should have been given, and that the charge of the court was so utterly unadapted to the case as it would have been

\*501

if they had been \*given, as to be valueless or worse as a direction to the jury, I think that the least that can be done, in the interest of the orderly administration of justice, is to grant a new trial and let a new jury, properly instructed, pass upon the case.

I cannot see, as my Associates seem to see, that the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority on the one hand, or to the freedom of the press on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men, because this court hesitates to exercise the power, which it undoubtedly possesses, to correct, in this calmer time, errors of law which would not have been committed, but for the stress and strain of feeling prevailing in the early months of the late deplorable war.

(252 U. S. 7)

FARNCOMB et al. v. CITY AND COUNTY OF DENVER et al.

(Argued Jan. 14, 1920. Decided March 1, 1920.)

No. 110.

1. COURTS ~~§~~366(1) — SUPREME COURT ACCEPTS CONSTRUCTION OF STATE STATUTES BY STATE COURTS.

The federal Supreme Court, when dealing with the constitutionality of state statutes under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the state.

2. CONSTITUTIONAL LAW ~~§~~290(4)—MUNICIPAL CORPORATIONS ~~§~~455—CHARTER PROVISION AS TO ASSESSMENTS FOR PUBLIC IMPROVEMENTS HELD NOT TO DENY DUE PROCESS.

Denver City Charter, § 328, relative to complaints and objections with respect to assessments for public improvements, does not, as construed by the state Supreme Court, deny due process of law, by denying property owners a hearing before a board having power to decide the complaint.

3. MUNICIPAL CORPORATIONS ~~§~~488, 489(5)—PROPERTY OWNERS NOT ATTENDING HEARING ON ASSESSMENT NOT ENTITLED TO COMPLAIN.

Property owners, who did not avail themselves of the privilege of a hearing respecting assessments for a public improvement, under Denver City Charter, § 300, could not complain of the assessments thereafter.

In Error to the Supreme Court of the State of Colorado.

Suit by Henry Farncomb and others against the City and County of Denver, and others. A judgment for defendants was affirmed by the Supreme Court of Colorado (171 Pac. 66), and plaintiffs bring error. Affirmed.

Mr. T. J. O'Donnell, of Denver, Colo., for plaintiffs in error.

Mr. James A. Marsh, of Denver, Colo., for defendants in error.

\*8

\*Mr. Justice DAY delivered the opinion of the Court.

Suit was brought in the district court of the city and county of Denver by the plaintiffs in error to enjoin the city from enforcing an assessment ordinance passed to raise the necessary means to pay for certain park improvements and the construction of boulevards and streets in the city of Denver.

The charter of the city of Denver was before this court in *Londoner v. City and County of Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103. Sections 298 and 299 of the charter provided that the board of local improvements shall prepare a statement showing the costs of improvements, interest, cost of collection, etc., and apportion the same upon each lot or tract of land to be assessed, shall cause the same to be certified by the president, and filed in the office of the clerk. The clerk shall then by advertisement in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed and all persons interested that said improvements have been or will be completed, and shall specify the whole cost of the improvement, and the share so apportioned to each lot, or tract of land, or person, and any complaint or objection that may be made in writing by such persons or owners to the board of supervisors, and filed with the clerk within 60 days from the first publication of such notice, shall be heard and determined by the board of supervisors at its first regular meeting after 60 days, and before the passage of any ordinance assessing the cost of the improvements.

Section 300 provides:

"At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall

hear and determine all such complaints and objections, and may recommend to the board of public works any modification of their apportion-

ments; the board of public \*works may thereupon make such modifications and changes as to them may seem equitable and just, and may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the costs of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

Section 328 of the charter provides:

"When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in section 298 hereof; the clerk shall thereupon give the notice required by section 299 hereof; and thereupon the same proceedings required in section 300 hereof shall be had, except that the proceedings therein provided to be observed by the board shall be observed by the park commission; and the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

The federal question, brought before us by the writ of error, concerns the constitutionality of section 300, above set forth—the contention being that it does not give interested property owners the opportunity to be heard where the property is to be specially assessed for making improvements of the character in question, as the hearing provided is before a board which has no power to decide any complaint which the property owner may have or make with respect to the validity or falseness of such assessment, or to correct any error in such assessment, but only has power to recommend to the power or authority, originally making the assessment, any modifications of portions of such assessment; that is, that the board of supervisors has only the power to recommend to the board of park commissioners the apportionment to be made in the assessment. It is the contention of the plaintiffs in error that the

\*10

hearing thus afforded does not \*give due process of law within the meaning of the Fourteenth Amendment to the Constitution. The Supreme Court of Colorado, affirming the judgment of the district court, denied this contention, and affirmed the judgment of the district court sustaining the validity of the assessment. 171 Pac. 66.

The Supreme Court of Colorado held that the question had already been disposed of by its own previous decision, affirmed as to the constitutional point by our decision in *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, *supra*. In *Londoner v. Denver* the section of the charter now involved was before this court, being then section 31 of the charter. Section 300 to all intents is the same in terms as section 31, ex-

cept that the board of supervisors, sitting as a board of equalization, is substituted for the city council.

[1] This court when dealing with the constitutionality of state statutes, challenged under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the state. *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419, 427, 36 Sup. Ct. 647, 60 L. Ed. 1072.

[2] In *Londoner v. Denver* this court accepted, as it was bound to do, the construction of the charter made by the state court, and upon that construction determined its constitutional validity. The city charter was construed in the Supreme Court in 33 Colo. 104, 80 Pac. 117. In the opinion in that case, after discussing the steps required in making improvements of the character involved here, the court, in dealing with section 31, said (33 Colo. 117, 80 Pac. 121):

"Notwithstanding the apparently mandatory words used in section 31, *supra*, we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable."

\*11

\*Adopting this construction of the section, and considering the objection urged that it would not afford due process of law, this court by Mr. Justice Moody said (210 U. S. 379, 28 Sup. Ct. 711, 52 L. Ed. 1103):

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver v. Kennedy*, 33 Colo. 80 [80 Pac. 122, 467]; *Denver v. Dumars*, 33 Colo. 94 [80 Pac. 114]. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by section 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant' (33 Colo. 97 [80 Pac. 114]); and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults."



[3] Plaintiffs in error did not avail themselves of the privilege of a hearing as provided by this section, but after the assessing ordinance had been passed began this proceeding in the district court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the

\*12

\*sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colorado, and by our decision based upon that construction in *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, supra. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by section 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be

Affirmed.

(252 U. S. 12)

GOLDSMITH et al. v. GEORGE G. PRENDERGAST CONST. CO.

(Argued Jan. 13 and 14, 1920. Decided March 1, 1920.)

No. 127.

1. COURTS  $\S$ 394(10)—ACTION OF STATE COURTS IN UPHOLDING SEWER ASSESSMENT NOT REVERSIBLE BECAUSE PROPERTY EXCLUDED MIGHT DRAIN INTO SEWER.

The mere fact that part of a city park excluded from a sewer assessment district might have been drained into the sewer will not warrant the federal Supreme Court in reversing the action of the state courts in upholding the assessment on the ground that by such exclusion the assessment is rendered void as a deprivation of constitutional rights secured to property owners by the due process and equal protection clauses of Const. Amend. 14.

2. CONSTITUTIONAL LAW  $\S$ 233, 290(1)—ASSESSMENT DISTURBED AS VIOLATIVE OF FEDERAL RIGHTS ONLY WHEN ARBITRARY OR UNEQUAL.

The federal Supreme Court only interferes with assessments for public improvements on the ground of violation of constitutional rights secured by Const. Amend. 14 when the action of the state authorities is arbitrary or wholly unequal in operation and effect.

3. COURTS  $\S$ 394(25)—REFUSAL TO TRANSFER CAUSE TO COURT EN BANC VIOLATES NO CONSTITUTIONAL RIGHT.

No federal constitutional right was violated by the refusal of the Missouri Supreme Court to transfer a cause from a division of that court to the court en banc.

In Error to the Supreme Court of the State of Missouri.

Action by the George G. Prendergast Construction Company against David Goldsmith and others. A judgment for plaintiff was affirmed by the Supreme Court of Missouri (273 Mo. 184, 201 S. W. 354), and defendants bring error. Affirmed.

Mr. David Goldsmith, of St. Louis, Mo., for plaintiffs in error.

Mr. Hickman P. Rodgers, of St. Louis, Mo., for defendant in error.

\*14

\*Mr. Justice DAY delivered the opinion of the Court.

Suit was brought in the circuit court of the city of St. Louis by the Construction Company to recover upon a special tax-bill issued by the city of St. Louis for the construction of the sewer in what is known as Manchester Road sewer district No. 111, city of St. Louis. The Construction Company recovered a judgment on the tax-bills against the plaintiffs in error, who were owners of abutting property. Upon appeal to the Supreme Court of Missouri the judgment below was affirmed upon hearing and rehearing. *Prendergast Const. Co. v. Goldsmith*, 273 Mo. 184, 201 S. W. 354.

The record discloses that the sewer, for the construction of which the assessment was made, was constructed in a certain boulevard known as Kingshighway Boulevard. On the east of this boulevard, and fronting on the same for a considerable distance, is a tract belonging to the city, and known as Tower Grove Park; this property was not assessed for the building of the sewer. This omission is alleged to be of such an arbitrary and discriminatory character as to render the ordinance making the assessment void as a deprivation of federal constitutional rights

\*15

\*secured to the plaintiffs in error by the due process and equal protection clauses of the Fourteenth Amendment.

The circuit court made findings of fact in which it found that there was no evidence that the municipal assembly of the city of St. Louis, in passing the ordinances in question, was actuated by motives of fraud or oppression; that such motives, if any, must be inferred solely from the failure to incorporate parcels or tracts of land in the sewer district, the topography of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the sewer. The court recites the nature of the title of the tract known as Tower Grove Park.

It appears that the park had been conveyed to the city, the grantor reserving therefrom a strip 200 feet wide, surrounding the same. The court found that the western front of the tract, thus conveyed to the city included the western gate or entrance of the park and the strip of 200 feet in width, surround-

ing the park proper, and embraced a total frontage along Kingshighway of about 1470 feet, and that none of the property included within Tower Grove park and the strip of 200 feet in width, reserved for a residence property, was included within the taxing district for such sewer construction. The court also finds that with the exception of an area composing some 300 feet, each way, located at the southwestern corner of the Park, the western part of the park for a distance of some 600 feet east of Kingshighway is of an elevation higher than Kingshighway between Arsenal street and Magnolia avenue, and the natural drainage thereof is in the main westwardly towards Kingshighway and that before the building of the sewer in question surface water and hydrants drained from said part of the park through drains and gutters under said street and sidewalk to a point west of Kingshighway. That whatever drains for surface and hydrant water existed in said

\*16

western and north\*western portion of the park led into that section of the sewer in question, situated in Kingshighway adjoining the park; but the court finds that it is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom. The court also finds that at the time the work in question was performed it was provided by the revised ordinances of the city of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer if available, and if not then through pipes below the sidewalk, and into the open gutter of the street. The court does not find from the evidence that it was not possible or feasible to drain the surface water falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway, and that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

As conclusions of law the court finds that it was within the powers of the municipal assembly, in the passage of the ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in their judgment, should be benefited thereby; that the discretion vested in the municipal legislature was not subject to review by this court, unless the powers of the legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily. And the court found that the mere omission of the lands from said district which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to as-

sume that the same would be more conveniently served by the sewer in question

\*17

than any other, did not justify \*the court in concluding that the municipal assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud, or oppression; or that the prima facie liability of defendants established by the certified special tax-bill is thereby rebutted and overturned.

On the facts and conclusions of law the judgment was affirmed by the Supreme Court of Missouri.

The establishment of sewer districts was committed to local authorities by the charter of the city of St. Louis which had the force and effect of a statute of the State. That charter provided that within the limits of the district prescribed by ordinance recommended by the board of public improvements, the municipal assembly might establish sewer districts, and such sewers may be connected with a sewer of any class or with a natural course of drainage. See section 21, Woerner's Revised Code of St. Louis 1907, p. 410.

[1] The mere fact that the court found that a part of Tower Grove Park might have been drained into the sewer, it was held by the Missouri courts, under all the circumstances, did not justify judicial interference with the exercise of the discretion vested in the municipal authorities. The court commented on the fact that it was not shown that any considerable amount of surface water was conducted away from the park by this sewer. Much less do such findings afford reason for this court in the exercise of its revisory power under the federal Constitution to reverse the action of the state courts, which fully considered the facts, and refused to invalidate the assessment.

[2] As we have frequently declared, this court only interferes with such assessments on the ground of violation of constitutional rights secured by the Fourteenth Amendment, when the action of the state authorities is found to be arbitrary, or wholly unequal in

\*18

operation and effect. \*We need but refer to some of the cases in which this principle has been declared. *Embree v. Kansas City Road District*, 240 U. S. 242, 36 Sup. Ct. 317, 60 L. Ed. 624; *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 39 Sup. Ct. 200, 63 L. Ed. 479; *Hancock v. Muskogee*, 250 U. S. 454, 39 Sup. Ct. 528, 63 L. Ed. 1081; *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. —, decided December 22, 1919.

[3] We find no merit in the contention that a federal constitutional right was violated because of the refusal to transfer the cause from the division of the Supreme Court of Missouri, which heard it, to the court en banc. See *Moore v. Missouri*, 159 U. S. 673, 679, 16 Sup. Ct. 179, 40 L. Ed. 301.

Affirmed.



(252 U. S. 18)

CHICAGO, R. I. &amp; P. RY. CO. et al. v. WARD.

(Submitted Jan. 28, 1920. Decided March 1, 1920.)

No. 198.

1. MASTER AND SERVANT ⇨204(1)—UNDER FEDERAL EMPLOYERS' LIABILITY ACT, RISK OF MASTER'S NEGLIGENCE MAY BE ASSUMED.

Under the federal Employers' Liability Act, it is not true, without qualification, that a servant does not assume a risk created by the master's negligence.

2. MASTER AND SERVANT ⇨204(1)—ASSUMPTION OF RISK DEFENSE TO ACTION NOT BASED ON FEDERAL EMPLOYERS' LIABILITY ACT.

In an action under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) for an injury not caused by the violation of some statute enacted to promote the safety of employees, assumption of risk is a defense.

3. MASTER AND SERVANT ⇨204(3)—ASSUMPTION OF RISK OF COEMPLOYEE'S NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT DEFINED.

As to assumption of risk, the federal Employers' Liability Act (Comp. St. §§ 8657-8665) places a coemployee's negligence, when it is the ground of an action, in the same relation as that of the employer.

4. MASTER AND SERVANT ⇨213(4)—SWITCHMAN ENTITLED TO ASSUME CARS WILL BE OPERATED IN USUAL MANNER.

In the absence of notice to the contrary, a switchman on a cut of cars to be cut off from the engine had a right to act on the belief that the usual method would be followed and the cars cut off at the proper time, so that he might safely proceed to perform his duty of setting the brake to check the cars.

5. MASTER AND SERVANT ⇨213(4)—SWITCHMAN HELD NOT TO HAVE ASSUMED RISK OF INJURY FROM NEGLIGENT MANNER OF CUTTING CARS.

A switchman, whose duty it was to set the brake on a cut of cars after it had been cut off from the engine, and who was injured by the sudden checking of the cars, due to the engine foreman's failure to make the disconnection when the speed of the engine was reduced, did not assume the risk, as the injury did not result from an obvious condition of danger, but from the negligent operation of the particular cut of cars.

6. APPEAL AND ERROR ⇨1064(1)—INSTRUCTION HELD NOT PREJUDICIAL, WHERE FACTS DID NOT SHOW ASSUMPTION OF RISK.

Where, under the facts shown, a servant suing for an injury did not assume the risk, an inaccurate instruction that a servant did not assume the risk of the master's negligence was not prejudicial.

7. APPEAL AND ERROR ⇨1033(5)—INSTRUCTION THAT CONTRIBUTORY NEGLIGENCE WOULD PREVENT RECOVERY HELD FAVORABLE TO DEFENDANT.

As, under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), contributory negligence only goes in mitigation of damages,

and instruction that it would prevent a recovery was too favorable to defendants, and not prejudicial to them.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Action by Fred Ward against the Chicago, Rock Island & Pacific Railway Company and another. A judgment for plaintiff was affirmed by the Supreme Court of Oklahoma (173 Pac. 212), and defendants bring certiorari. Affirmed.

\*19

\*Messrs. R. J. Roberts, of El Reno, Okl., W. H. Moore, of McAlester, Okl., Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., and W. F. Dickinson, of Chicago, Ill., for petitioners.

Mr. W. S. Pendleton, of Shawnee, Okl., for respondent.

Mr. Justice DAY delivered the opinion of the Court.

Suit was brought in the superior court, Pottawatomie county, Oklahoma, against the Chicago, Rock Island & Pacific Railway Company and A. J. Carney to recover damages for injuries alleged to have been received by Ward while he was employed as a switchman of the railway company in its yards at Shawnee. He recovered a judgment which was affirmed by the Supreme Court of Oklahoma, 173 Pac. 212. The ground upon which recovery was sought against the railway company and Carney, who was an engine foreman, was that Ward, while engaged in his duty as a switchman, was suddenly thrown from the top of a box car upon which he was about to apply a brake. The petition alleged, and the testimony tended to show,

\*20

that Ward was engaged as a switchman on a cut of cars which it was the duty of the engine foreman to cut loose from the engine pushing the cars in order that Ward might gradually stop the cars by applying the brake. It appears that at the time of the injury to Ward, the cut of cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that when the check reached the car upon which Ward was about to set the brake, he was suddenly thrown

from the top of the car with the resulting injuries for which he brought this action.

The railway company and Carney took issue upon the allegations of the petition, and set up contributory negligence and assumption of risk as defenses. The trial court left the question of negligence on the part of the company and the engine foreman to the jury, and also instructed it as to assumption of risk by an employé of the ordinary hazards of the work in which he was engaged, and further charged the jury as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence nor such as are la-

\*21  
tent, or are only discoverable at \*the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or nonappreciation is not due to negligence or want of care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries."

[1, 2] Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), being those in which the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employes. As this case was not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. *Seaboard Air Line R. R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Jacobs v. Southern Railway Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

[3] As to the nature of the risk assumed by an employé in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Railway Co. v. De Atley*, 241 U. S. 310, 315, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016):

"According to our decisions, the settled rule is, not that it is the duty of an employé to exercise care to discover extraordinary dangers

that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employé may assume that the employer or his agents have exercised proper care with respect to his safety

\*22  
until \*notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

The federal Employers' Liability Act places a coemployé's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313, 36 Sup. Ct. 564, 60 L. Ed. 1016. See also *Chesapeake & Ohio R. Co. v. Proffitt*, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102; *Erie Railway Co. v. Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166.

[4-6] Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of though inaccurate could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk.

\*23  
[7] \*The trial court also charged that contributory negligence by Ward would prevent a recovery. This charge was more favorable to the petitioners than they were entitled to, as under the federal Employers' Liability Act contributory negligence is not a defense, and only goes in mitigation of damages. The giving of this charge could not have been prejudicial error requiring a reversal of the judgment.



Another assignment of error, dealt with by the Supreme Court of Oklahoma, that a jury of less than 12 returned the verdict, conforming to the state practice, does not seem to be pressed here. In any event it is disposed of by *St. Louis & San Francisco R. R. Co. v. Brown*, 241 U. S. 223, 36 Sup. Ct. 602, 60 L. Ed. 966.

We find no error in the judgment of the Supreme Court of Oklahoma and the same is affirmed.

(251 U. S. 401)

BOARD OF PUBLIC UTILITY COM'RS v. YNCHAUSTI & CO. et al.

(Argued Jan. 27, 1920. Decided March 1, 1920.)

No. 190.

1. CONSTITUTIONAL LAW §297 — EMINENT DOMAIN §2(1)—REQUIRING FREE CARRIAGE OF MAIL IN COASTWISE TRADE DOES NOT DENY DUE PROCESS OR TAKE PROPERTY WITHOUT COMPENSATION.

The guaranty by the Philippine Bill of Rights of due process, or its prohibition against the taking of private property for public use without compensation, is not violated by requiring vessels engaging in the coastwise trade to carry the mails free if the Philippine government possessed the power to so limit the right to engage in the coastwise trade.

2. POST OFFICE §22 — ACCEPTANCE OF LICENSE NOT VOLUNTARY ASSUMPTION OF OBLIGATION TO CARRY MAILS FREE.

Assuming that, under the Philippine Bill of Rights, the government could not require the free carriage of mail as a condition of engaging in the coastwise trade, shipowners did not, by accepting a license on such condition, voluntarily assume the obligation of free carriage.

3. TERRITORIES §15—PHILIPPINE BILL OF RIGHTS TO BE CONSTRUED AS IN THE UNITED STATES, BUT APPLICATION DEPENDENT ON POWERS CONFERRED ON GOVERNMENT.

The provisions of the Bill of Rights of the Philippine Islands are to have the settled construction they have received in the United States, but their application to governmental powers must depend on the nature and character of the powers conferred by Congress on the government of the Islands.

4. TERRITORIES §17 — PHILIPPINE GOVERNMENT AUTHORIZED TO REQUIRE FREE CARRIAGE OF MAIL BY VESSELS ENGAGING IN COASTWISE TRADE.

The Philippine government has power to require the free carriage of the mail as a condition of engaging in the coastwise trade in view of the power exercised over preceding forms of government and the provisions of Act April 15, 1904, § 3, authorizing the Philippine government to adopt regulations governing transportation between places in the Islands.

5. TERRITORIES §11 — CONGRESS NOT RESTRICTED BY CONSTITUTIONAL LIMITATIONS IN LEGISLATING FOR TERRITORY NOT INCORPORATED INTO THE UNITED STATES.

The constitutional limitations of power on the authority of Congress when legislating for the United States are not applicable and controlling on Congress when it comes to exert legislative powers over territory not forming part of United States, because not incorporated therein.

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

Proceeding before the Board of Public Utility Commissioners of the Philippine Islands against Ynchausti & Co. and others. The order of the Board was reversed by the Philippine Island Supreme Court, and it brings certiorari. Reversed.

Messrs. Chester J. Gerkin and Edward S. Bailey, both of Washington, D. C., for petitioner.

Messrs. Alexander Britton and Evans Browne, both of Washington, D. C., for respondents.

\*402

\*Mr. Chief Justice WHITE delivered the opinion of the Court.

Was error committed by the court below in deciding that the Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, was void for repugnancy to the Philippine Bill of Rights is the question which comes before us for decision as the result of the allowance of a writ of certiorari.

The issue will be clarified by a brief reference to the antecedents of the controversy. Under the Spanish law as enforced in the Philippine Islands before the American domination the duty of free carriage as stated existed. Upon the cession of the Islands to the United States and the establishment there of a military government the existing condition of the subject was continued in force. It thus continued until the government passed into the hands of the Philippine Commission and was by that body specifically recognized and its further enforcement directed. Thus it prevailed without interruption until 1902 when the first act of Congress providing a general system of civil government for the Islands was passed, and it further remained operative until 1904 when Congress passed the act of that year specifically dealing with the authority of the Philippine government to provide for the coastwise trade, as follows (33 Stat. 181):

"Until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Archipelago the government of the Philippine Islands is hereby

authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago." Section 3.

In fact the continued operation of the obli-

**\*403**

gation to \*carry the mails free which arose from engaging in the coastwise trade, it may be taken for granted, remained in force until 1916, since the obligation was recognized as being yet in existence and the duty to enforce it for the future was directed by article 310 of the Administrative Code of that year, in which Code were also stated the existing provisions as to the registry, licensing, etc., of Philippine vessels. That the requirement continued operative thereafter results from the further fact that it was re-expressed in section 658 of the Administrative Code of 1917, which Code was adopted to meet the exigencies created by the later Organic Act of the Philippine Islands enacted by Congress in August, 1916 (39 Stat. 545 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3804a et seq.]).

We have not stopped to refer to the Spanish law, to the military orders to the reports of civilian officials, and to the action of the Philippine Commission on the subject, as above stated, because the references to them were made below in marginal note A, which Mr. Justice Carson made a part of his dissenting opinion (— P. I. —).

It is undoubted that during all this period vessels were permitted to engage in the coastwise trade only upon the issuance to and the acceptance by them of licenses the enjoyment of which depended upon the performance of the legal duty of the free carriage of the mails.

The respondents were in 1916 the owners of steam vessels of Philippine registry licensed to engage in the coastwise trade upon the condition stated, and the controversy before us arose in consequence of a notice given by them to the Philippine Director of Posts that after a date designated they would no longer comply with the duty to carry the mails free. That official sought its enforcement at the hands of the Board of Public Utility Commissioners. Before that Board the respondents, the licensees, relied upon the assertion that the section of the Administrative Code imposing the duty of free mail carriage was in conflict with the provisions

**\*404**

of the Philippine Bill of Rights, \*guaranteeing due process and prohibiting the taking of private property for public use without just compensation. The Board overruled the defense and awarded an order directing compliance with the law and therefore prohibited the carrying out of the intention to discontinue. In reaching this conclusion the Board held that its sole duty was to ascertain whether the law imposed the obligation to

carry the mails free, and, if it did, to enforce it without regard to the defense as to the repugnancy of the statute to the Bill of Rights, since that question was proper only to be disposed of by judicial action.

The Supreme Court, to which the controversy was taken, not differing as to the existence of the statutory duty, reversed the order on the ground that such duty could not be exacted consistently with the clauses of the Bill of Rights relied upon. No opinion stating the reasons for this conclusion was expressed, but a member of the court dissented and stated his reasons in an elaborate opinion.

[1, 2] It is impossible to conceive how either the guaranty by the Bill of Rights of due process or its prohibition against the taking of private property for public use without compensation can have the slightest application to the case if the Philippine government possessed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. It must follow that the existence of such power is the real question which is required to be decided. In saying this we put out of view as obviously erroneous the contention that, even though the Bill of Rights applied and limited the authority of the government so as to prevent the exaction by law of the free carriage of the mails, that result is not applicable here because by accepting a license the shipowners voluntarily assumed the obligation of free carriage. *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 942; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 27-30, 30 Sup. Ct. 190, 54 L. Ed.

**\*405**

355; *Pullman Co. v. Kansas*, 216 U. S. 56, 70, 30 Sup. Ct. 232, 54 L. Ed. 378; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 300, 301, 32 Sup. Ct. 218, 56 L. Ed. 445; *Kansas City Ry. v. Kansas*, 240 U. S. 227, 233-234, 36 Sup. Ct. 261, 60 L. Ed. 617; *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278.

[3] To what extent the Bill of Rights limits the authority of the government of the Philippine Islands over the subject of the free carriage of the mails is, then, the determinative factor. Beyond doubt Congress, in providing a Bill of Rights for those Islands, intended its provisions to have there the settled construction they have received in the United States. But it must be and is indisputable that, when the provisions of such Bill come to be applied to governmental powers in the Philippine Islands, the result of their application must depend upon the nature and character of the powers conferred by Congress upon the government of the Islands. To illustrate, where a particular activity in the Philippine Islands is, as the result of power conferred by Congress, under governmental control to such an extent that



the right to engage in it can be made by the Philippine government dependent upon the performance of a particular duty, it is obvious that the exaction of such a duty, as such prerequisite condition, can be neither a denial of due process or a taking of property without compensation.

[4] Coming to the proposition to which the case is therefore ultimately reduced, we see no reason to doubt that the Philippine government had the power to deal with the coastwise trade so as to permit its enjoyment only by those who were willing to comply with the condition as to free mail carriage, and therefore that no violation of individual right could have resulted from giving effect to such condition. We reach this conclusion because the possession and exercise of such power in the Islands before their cession to the United States, its exertion under the military government of the United States which followed the cession, and its continuance by every form of civil

\*406

\*government created by Congress for the Islands, compels to that view in the absence of any law expressly providing to the contrary or which by reasonable implication leads to that result.

Indeed the conclusion that the power was possessed does not rest alone upon the general consideration stated, since it is additionally sustained by recalling the express provision of the act of Congress of 1904, to which we have previously referred, giving authority for the registry of Philippine vessels and recognizing the power of the government of the Philippine Islands to deal with the coastwise trade, an authority which, as it contains no provision tending to the contrary, must be construed as applicable to and sanctioning the power which had been exerted from the very inception of the American domination, to provide as to that trade for the free carriage of the mails. In other words, in view of the power to impose the burden in question, exerted in the Philippine Islands from the beginning and which was then being exerted under the authority of Congress, the conferring by Congress upon the Philippine government by the act of 1904 of the authority to make regulations concerning such trade was a recognition of the right to make the regulation theretofore made, which was then in force, and which continued to be in force up to the time of the bringing of this suit, without disapproval or change by Congress.

[5] When the authority which the act of 1904 gave is borne in mind it makes it clear that the mistake which underlies the entire argument as to the nonexistence of power here relied upon arises from the erroneous assumption that the constitutional limitations of power which operate upon the authority of Congress when legislating for the United

States are applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming

\*407

part of the United States because not \*incorporated therein. *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *Hawaii v. Mankichi*, 190 U. S. 197, 220, 23 Sup. Ct. 787, 47 L. Ed. 1016; *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; *Dowdell v. United States*, 221 U. S. 325, 332, 31 Sup. Ct. 590, 55 L. Ed. 753; *Ocampo v. United States*, 234 U. S. 91, 98, 34 Sup. Ct. 712, 58 L. Ed. 1231.

The error which thus underlies the whole argument becomes more conspicuously manifest by recalling that Congress in the act of 1904 expressly provided that the authority which that act gave should exist only until Congress should otherwise provide, and, besides, that before the passage of that act, Act July 1, 1902, § 86 (32 Stat. 691, 712), provided "that all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same."

Judgment reversed.

(252 U. S. 23)

PENNSYLVANIA GAS CO. v. PUBLIC SERVICE COMMISSION, SECOND DIST., OF STATE OF NEW YORK et al.

(Argued Dec. 8 and 9, 1919. Decided March 1, 1920.)

No. 330.

1. COMMERCE ⚡33 — TRANSMISSION OF GAS THROUGH PIPE LINES TO CONSUMERS IN ANOTHER STATE IS "INTERSTATE COMMERCE."

The transmission and sale of natural gas produced in one state and transported by means of pipe lines and directly furnished to consumers in another state by the company so producing and transporting it is "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE ⚡10—UNTIL CONGRESS ACTS STATE MAY REGULATE LOCAL MATTERS INDIRECTLY AFFECTING INTERSTATE COMMERCE.

While a state may not directly regulate or burden interstate commerce, until Congress acts under its superior authority, it may protect or regulate matters of local interest, though indirectly affecting such commerce.

3. COMMERCE ⚡10—STATE MAY REGULATE PRICE OF GAS TRANSMITTED THROUGH PIPE LINES FROM ANOTHER STATE, IN ABSENCE OF ACTION BY CONGRESS.

Where a gas company is supplying gas to local consumers, who are reached by the use of the streets of a city in which its pipes are

laid, and is performing a service similar to that of a local plant furnishing gas to consumers, the state may, until Congress asserts its superior power, regulate the price of the gas to consumers, though it is brought through pipe lines from another state by the company so furnishing it.

In Error to the Supreme Court of the State of New York.

Prohibition proceeding by the Pennsylvania Gas Company against the Public Service Commission, Second District, of State of New York and others. An order of the Appellate Division (184 App. Div. 556, 171 N. Y. Supp. 1028), reversing an order of the Special Term (103 Misc. Rep. 37, 169 N. Y. Supp. 820), was affirmed by the Court of Appeals of New York (225 N. Y. 397, 122 N. E. 260), and the petitioner brings error. Affirmed.

Messrs. John E. Mullin, of Kane, Pa., and Marion H. Fisher, of Jamestown, N. Y., for plaintiff in error.

Messrs. Ledyard P. Hale, of Albany, N. Y., and Louis L. Thrasher, of Jamestown, N. Y., for defendants in error.

\*26

\*Mr. Justice DAY delivered the opinion of the Court.

This writ of error brings before us for consideration the question whether the Public Service Commission of the State of New York has the power to regulate rates at which natural gas shall be furnished by the Pennsylvania Gas Company, plaintiff in error, to consumers in the city of Jamestown in the state

\*27

of New York. The Court of Appeals of New York (225 N. Y. 397, 122 N. E. 260) held that the Commission had such authority.

The statute of the state of New York, section 65 Public Service Commission Law (Laws 1910, c. 480), provides:

"Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

Consumers of gas, furnished by the plaintiff in error in the city of Jamestown, New York, filed a complaint demanding a reduction of gas rates in that city. The Public Service Commission asserted its jurisdiction which, as we have said, was sustained by the Court of Appeals of New York.

The federal question presented for our consideration involves the correctness of the con-

tention of the plaintiff in error that the authority undertaken to be exercised by the commission, and sustained by the court, was an attempt under state authority to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the states. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the state of Pennsylvania and engaged in transmitting and selling natural gas in the state of New York and Pennsylvania. It transports the gas by pipe lines about fifty miles in length from the

\*28

source of supply in the state of Pennsylvania into the state of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Ellicott, and in the village of Falconer, all in Chataugua county, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry and Erie in Pennsylvania.

[1] We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines and directly furnished to consumers in another state is interstate commerce within the principles of the cases already determined by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278.

This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577, wherein we dealt with the piping of natural gas from one state to another, and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation.

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is in our opinion, a transmission in interstate commerce, and

\*29

therefore subject to applicable constitutional limitations which govern the states in dealing



with matters of the character of the one now before us.

[2] The general principle is well established and often asserted in the decisions of this court that the state may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the states to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the states a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (230 U. S. 402, 33 Sup. Ct. 741, 57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18):

"But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they

\*30

should go uncontrolled \*pending federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state Legislature from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. \* \* \* Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which

the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power. In such case, Congress must be the judge of the necessity of federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. Chapter 309, § 7, 36 Stat. 539, 544 (Comp. St. § 8563).

[3] The thing which the state commission has undertaken to regulate, while part of an

\*31

interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution.

The principles announced, often reiterated in the decisions of this court were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that until the subject-matter is regulated by congressional action, the exercise of

authority conferred by the state upon the Public Service Commission is not violative of the commerce clause of the federal Constitution.

Affirmed.

(251 U. S. 507)

WORTH BROS. CO. v. LEDERER, Collector of Internal Revenue.

(Argued Jan. 8 and 9, 1920. Decided March 1, 1920.)

No. 525.

INTERNAL REVENUE ~~CO.~~—9—MANUFACTURER OF SHELL FORGINGS LIABLE TO MUNITIONS TAX AS MANUFACTURER OF "PARTS OF SHELLS."

A company doing the forging on shell bodies under an order from a manufacturer of explosive shells was subject to the tax imposed by Act Sept. 8, 1916, § 301 (Comp. St. § 6336¼b), on every person manufacturing certain articles and shells, or any part of such articles, as shell forgings are "parts of shells."

Mr. Justice Day and Mr. Justice Van Devanter dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Worth Bros. Company against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. A judgment for the defendant was affirmed by the Circuit Court of Appeals for the Third Circuit (258 Fed. 533), and plaintiff brings certiorari. Affirmed.

See, also, 250 U. S. 656, 40 Sup. Ct. 15, 63 L. Ed. 1192.

Mr. A. H. Wintersteen, of Philadelphia, Pa., for petitioner.

Mr. Assistant Attorney General Frierson, for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

This writ is directed to the judgment of the Circuit Court of Appeals affirming a judgment of the District Court for Lederer, to

\*508

whom we shall refer as the collector, \*in an action by petitioner to recover from him the sum of \$74,857.07 exacted as a tax under section 301 of the Munition Manufacturer's Tax Act of September 8, 1916, 39 Stat. 756, 781, (Comp. St. § 6336¼b), and paid by petitioner under protest.

A detail of the imposition of the tax and the protest of its payment are unnecessary to give. The other facts were stipulated and it appears from the stipulation that during the taxable year 1916 petitioner made the steel for and did the forging on certain shell bodies under an order from the Midvale Steel Company, to enable the latter company to carry out a contract which it had with the

government of France for certain explosive shells. The steel was made and the forging done by petitioner in accordance with specifications required by the French government, which specifications were attached to the order from the Midvale Steel Company to petitioner.

Inspectors employed by the French government inspected the work done by petitioner, testing the steel and examining the forgings as they passed through petitioner's hands. "Up to the time when the blooms of steel were sliced partly through into billets, the right of inspection was exercised by the French inspector in chief, only whenever he desired to exercise it." Some forgings were rejected, and those that were passed were so marked by the inspector. This was done in accordance with an understanding between petitioner and the Midvale Steel Company.

The profits upon which the tax was claimed in this case was imposed were derived solely from the sale of the above-mentioned forgings.

The Munitions Tax Act provides (section 301, 39 Stat. c. 463, p. 781):

"That every person manufacturing" certain articles and "shells" "or any part of the articles mentioned \* \* \* shall pay for each taxable year, in addition to the income tax imposed by title I, an excise tax of twelve and

\*509

one-half per centum upon the entire net \*profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

The question is the simple and direct one whether a shell forging under the stipulation and evidence is "any part of a shell" within the meaning of the law. The argument of petitioner in support of a negative answer is very diffuse, pressing considerations which we do not think are relevant.

A shell is a definite article, constituted of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is) of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative, as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law by its words "any part" of any of the "shells" implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. "Otherwise," counsel say "the word [part] loses all precision and becomes equivalent to the words 'ingredient' or 'material composing or making up.'" And to sustain this view they take us



(40 Sup. Ct.)

to the dictionaries and to an enumeration of the processes to which the material must be subjected to make a forging, and those afterwards to prepare it for a shell. In this enumeration letters of the alphabet are used of which "A, B, C, and H represent stages of development of the material prior to delivery" to the Midvale Company, and "D, E, F, G, H, I, and K represent stages of development by Midvale after delivery to it." It is quite obvious of course as counsel declare, that the forgings were "not shells, since a shell is a composite structure of sev-

\*510

eral parts." But \*counsel go farther and say that the forgings were "not parts of shells in any practical and legal sense because their development was so far short—80 per cent.—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair meaning of the shell body unit as entering into the composite shell as a whole." We give counsel's words because we fear that by paraphrasing them we might not correctly represent their meaning and contention.

We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law. Besides petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material.

The progressive processes need not be enumerated. The lower courts have enumerated them and the Court of Appeals describing them said that the "steps" "six in all," were progressive advances toward the chemical constituents, the shape and dimensions required by and essential to, the manufacture of shells in compliance with the contract." And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French government began; the fifth took the fluid metal [the result of the second step] from the possibility of use for general commercial purposes and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging "was drawn to a length, and to an inside and outside diameter which enabled the Midvale Company to carry forward its

\*511

29 progressive steps, which the 6" of \*petitioner "were required to complete the manufactured shell of the contract."

"Manifestly," as counsel for the collector says, "the shell body was not completely manufactured by either of the companies which were engaged in its production," but

"by the two acting together." And each therefore is liable for the profit it made, and judgment is

Affirmed.

Mr. Justice DAY and Mr. Justice VAN DE VANTER dissent.

(251 U. S. 501)

CARBON STEEL CO. v. LEWELLYN, Collector of Internal Revenue.

(Argued Jan. 12, 1920. Decided March 1, 1920.)

No. 535.

1. INTERNAL REVENUE CODE—ONE CONTRACTING FOR MANUFACTURE OF SHELLS, BUT EMPLOYING INDEPENDENT CONTRACTORS, SUBJECT TO TAX ON "PERSON MANUFACTURING" SHELLS.

A company having a contract for the manufacture of high explosive shells, but employing independent contractors to do all of the work, except the manufacture of steel suitable for the shells in bar form, which it supplied to the subcontractors, together with transit plugs, fixing screws, and copper tubing, was subject to the tax imposed by Act Sept. 8, 1916, § 301 (Comp. St. § 6336¼b), on the profits of every "person manufacturing" shells, etc.

2. INTERNAL REVENUE CODE—TAX ON PROFITS OF MANUFACTURER OF SHELLS NOT DEFEATED BY FACT THAT SUBCONTRACTORS HAVE PAID TAX.

That subcontractors, employed by one contracting for the manufacture of explosive shells to do certain portions of the work, have paid a tax on their profits measured by the difference between the cost of doing the work and the amount paid therefor, does not defeat the liability of the principal contractor for the tax on its profits, under Act Sept. 8, 1916, § 301 (Comp. St. § 6336¼b).

Mr. Justice Day and Mr. Justice Van De venter dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Carbon Steel Company against C. G. Lewellyn, Collector of Internal Revenue. A judgment for defendant was affirmed by the Circuit Court of Appeals for the Third Circuit (258 Fed. 533), and plaintiff brings certiorari. Affirmed.

See, also, 250 U. S. 657, 40 Sup. Ct. 15, 63 L. Ed. 1193.

\*502

\*Mr. H. V. Blaxter, of Pittsburgh, Pa., for petitioners.

Mr. Assistant Attorney General Frierson, for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Petitioner brought this action against Lewellyn who is collector of internal revenue for

the Twenty-Third district of Pennsylvania, to recover the sum of \$271,062.62, with interest from December 29, 1917, paid to him, under a demand made by him, as collector for an excise tax assessed under section 301 of title III of the Act of September 8, 1916, known as "munition manufacturer's tax."

Petitioner made a verified return under protest, reciting its belief that the tax should be abated for the following reasons: (1) It (petitioner) did not manufacture munitions; (2) the munitions taxed were manufactured by certain independent contractors; (3) the profit derived by petitioner was from the sale of the munitions, not from their manufacture.

The tax was not abated and petitioner paid it under protest.

#### \*503

\*The facts are stipulated: Petitioner, through its president, who went to England, entered into three contracts with the British government dated, respectively, January 26, September 29, and October 7, 1915, for the manufacture and delivery f. a. s. New York, of a certain number of high explosive shells.

The work to complete the shells consisted of the following operations: (1) Obtaining suitable steel in bar form; (2) cutting or breaking the bars to proper length; (3) converting the bars or slugs into a hollow shell forging by means of a hydraulic press; (4) turning the shell upon a lathe to exact dimensions; (5) closing one end of the forging to form the nose of the shell; (6) drilling out the case of the shell and inserting a base plate; (7) threading the nose of the shell and inserting the nose bushing and inserting in the nose bushing a wooden plug to protect the thread thereof; (8) cutting a groove around the circumference of the shell and inserting thereon a copper driving band and turning the band to required dimensions; (9) varnishing, greasing, and crating the completed shell.

Petitioner was not equipped, nor did it have facilities, for doing any of the described work except the manufacture of steel suitable for the shells in bar form, and, therefore, to procure the manufacture of the shells it (petitioner) did certain work and entered into numerous contracts in relation to the various steps in making a completed shell.

[1] These steps are not necessary to give. The question in the case is not a broad one and all of the details of the stipulation are not necessary to its decision. The essential elements of fact we have given and whether they bring petitioner within the munitions Tax Act we shall proceed to consider.

The act is as follows:

"Sec. 301. (1) That every person manufacturing \* \* \* (c) projectiles, shells, or torpedoes of any kind; \* \* \* or (f) any part of any of the articles mentioned in \* \* \* (c)

#### \*504

\* \* \* —shall pay \*for each taxable year, in addition to the income tax imposed by title I,

an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States. \* \* \* Comp. St. § 6336½b.

The act is explicit in its declaration; perplexity and controversy come over its application. One must be a "person manufacturing" to incur the tax, but who is to be regarded as such person in the sense of the act? Or to put it another way, when is "manufacturing" (the word of the act) done, and when is "manufactured" (the word of the act) attained? In elucidation of the words, the specifications enumerate nine operations to produce a shell, that is a completed shell (except for explosive charge and detonating device), such as petitioner contracted to deliver to the British government. And all of the operations are asserted to be necessary and all must be performed seemingly by the same person in order that he may be designated as a "person manufacturing." We put aside for the purpose of testing the contention the provision of the act making a person manufacturing "any part of any of the articles mentioned" subject to "a tax."

The contention reduces the act to a practical nullity on account of the ease of its evasion. Besides petitioner minimizes what it did. It was the contractor for the delivery of shells, made the profits on them and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach—profits made out of the war and taxed to defray the expense of the war. Or, as expressed by the Court of Appeals, Congress "felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation." Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept

#### \*505

control \*throughout—never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it until delivered to the British government. And further, the steel furnished by it was advanced above a crude state—advanced to slugs. The nicking by an outside company we consider of no consequence, for after nicking they were redelivered to petitioner and by it "broken or separated" into slugs.

And petitioner supplied its respective subcontractors with other materials—"transit plugs," "fixing screws," and "copper tubing." It is, of course, the contention of petitioner that this was furnishing, not manufacturing, and that the literal meaning of words can be insisted on in resistance to a taxing statute. We recognize the rule of construction, but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's conten-



tion would so reduce it. How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a “person manufacturing”? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself and what he does through others as subsidiary to his obligation.

It is after all but a question of the kind or degree of agency—the difference, to use counsel's words, between “servants and general agents” and “brokers, dealers, middlemen or factors.” And this distinction between the agents counsel deems important and expresses it another way as follows:

“Every person manufacturing’ means the person doing the actual work individually, or through servants or general agents and that the ownership of the material worked upon does not alter this meaning of the word.”

#### \*506

\*We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of course it did not contemplate that “person manufacturing” should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents; availing thereby of the world's division of labor, but it contemplated also the world's division of occupations, and in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them.

[2] It is, however, alleged, and the stipulation shows, that the subcontracting companies paid a tax on their profits and profits were testified to be the difference between what was paid the subcontracting companies for the work and their cost in doing it. And it thus appears, it is urged, that petitioner has been taxed upon the theory that it manufactured the shells and the contracting companies “have been taxed for actually performing all the manufacturing necessary to complete the same shells.”

But it is a sufficient answer to say that the tax here in issue is the tax on the profits of the petitioner, not on the profits of the subcontractors. The question whether such subcontractors were correctly assessed concerns them and not the petitioner who is resisting a tax on the profits actually made by him and none other.

We consider further discussion unnecessary.

Judgment affirmed.

Mr. Justice DAY and Mr. Justice VAN DEVANTER dissent.

(251 U. S. 511)

FORGED STEEL WHEEL CO. v. LEWELLYN, Collector of Internal Revenue.

(Argued Jan. 8 and 9, 1920. Decided March 1, 1920.)

No. 526.

1. INTERNAL REVENUE  $\S$  9—MUNITION TAX APPLIES TO ONE MANUFACTURING FORGINGS, FROM WHICH SHELLS ARE MANUFACTURED.

Munitions Tax Act,  $\S$  301 (Comp. St.  $\S$  6336 $\frac{1}{4}$ b), imposing a tax on the profits of every person manufacturing shells “or any part” of them, is not limited to a substantially finished part, and applies to a manufacturer of rough steel shell forgings, constituting a hollow steel body of shell form, from which shells are manufactured by another party, for whom they are manufactured under contract.

2. APPEAL AND ERROR  $\S$  1177(1) — CIRCUIT COURT OF APPEALS PROPERLY REVERSED WITHOUT REMANDING WHERE ONLY PROPOSITIONS OF LAW WERE INVOLVED.

Where a case involved only propositions of law, it was not error for the Circuit Court of Appeals to reverse the judgment of the District Court, without remanding the case for a new trial, especially where there was no objection and no request for a remand.

Mr. Justice DAY and Mr. Justice VAN DEVANTER dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Forged Steel Wheel Company against C. G. Lewellyn, Collector of Internal Revenue. A judgment for plaintiff was reversed by the Circuit Court of Appeals (258 Fed. 533), and plaintiff brings error. Affirmed.

See, also, 250 U. S. 657, 40 Sup. Ct. 15, 63 L. Ed. 1193.

Messrs. George B. Gordon, of Pittsburgh, Pa., and George Sutherland, of Salt Lake City, Utah, for petitioner.

Mr. Assistant Attorney General Frierson, for respondent.

#### \*512

\*Mr. Justice McKENNA delivered the opinion of the Court.

Action brought by petitioner against Lewellyn, Collector of Internal Revenue in the District Court for the Western District of Pennsylvania, to recover the sum of \$246,920.18 exacted from petitioner as a tax under the Munitions Tax Act, and paid under protest. Interest was also prayed from November 27, 1917.

The tax was exacted upon the ground (and it was so alleged) that that sum was the tax on the amount of the net profits received by petitioner from the manufacture and sale of certain steel forgings used in the manufacture of shells.

The circumstances said to show the tax to have been illegally exacted were detailed, of

which there was denial by the collector, and upon issues thus formed the case was tried to a jury, which, in submission to the instructions of the court, returned a verdict for petitioner for the amount prayed. Judgment upon the verdict for the sum of \$263,258.06 was reversed by the Circuit Court of Appeals.

[1] The Court of Appeals considered in one opinion this case and Carbon Steel Co. v. Jewellyn and Worth Bros. Co. v. Lederer, 258 Fed. 533. The last two cases we have just decided (251 U. S. 501, 40 Sup. Ct. 283, 64 L. Ed. —; 251 U. S. 507, 40 Sup. Ct. 282, 64 L. Ed. —), and we can immediately say that, if this case does not differ from them in its facts, it does not in principle. It will turn, as they did, upon the construction of section 301 of the Munitions Tax Act (39 Stat. 756, 781 [Comp. St. § 6336¼b]) which imposes upon "every person manufacturing \* \* \*

\*513

shells \* \* \* *\*or any part\** [italics ours] of them, a tax of 12½ per cent. for each taxable year upon the entire net profits received or accrued for such years from the sale or disposition of the shells manufactured in the United States. The contention in the Worth Case was explicitly, as it is in this case, that the words "any part," as used in the act, "mean a substantially finished part"—a part, as there said, which has relation "to the whole structure and to the purpose it is intended to subserve." Here it is said:

"The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed."

The reasoning of the Worth Case, covers, therefore, the contention here, and rejects it, if, as we have said, the facts be the same, and we think they are. There are some circumstances of complexity, but they are easily resolved and do not disturb the principle of decision. Of the facts the Court of Appeals said:

"From the proofs it appears the British government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement, and inspection of the said government. To fulfill such shell contract the contractor made subcontracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor, rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made, or bought in the market, the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into eighteen-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by

\*514

draw\*ing it through three successive rings of a hydraulic press. The output of the Forged

Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape, and length, from which to make, to the British government standards, the high explosive projectiles contracted for. The weight of such shell forms was about 170 pounds. To make this shell form suitable for use as a shell the contractor to whom the Forged Steel Wheel Company then delivered it was required to dress, bore, and machine it down to 77 pounds; this required some 27 distinct and separate processes."

The court, after further comment on the facts, and consideration of the opinion of the District Court and its reasoning, and distinguishing the cases that influenced the District Court, said:

"But in the excise law in question Congress is dealing with the imposing of taxes as the main object, and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial."

And again:

"The crucial question is not the quantum of the manufacture measured by steps, but the fact of manufacture resulting in profits."

Replying to the contention that the purpose of Congress was not to tax any one but the manufacturer of a completed shell or the maker of a completed part of a shell, and that the forging of the Wheel Company was not a completed part of a shell, the Court of Appeals said:

"It is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words 'any part' to the restricted, specific, qualified term 'any completed part.'"

The Court of Appeals also considered the rule of construction that statutes levying taxes should not be extended by implication beyond the clear import of their language and the cases from which the rule was deduced. The rule was conceded; its application to the present controversy was denied.

\*515

\*For the sake of brevity we consider only the cited decisions of this court. They are Tide Water Oil Co. v. United States, 171 U. S. 210, 218, 18 Sup. Ct. 837, 43 L. Ed. 139; Worthington v. Robbins, 139 U. S. 337, 11 Sup. Ct. 581, 35 L. Ed. 181; Anheuser-Busch Association v. United States, 207 U. S. 556, 28 Sup. Ct. 204, 52 L. Ed. 336. These were customs cases, and the statutes were given an interpretation on account of their purpose. They are, besides, not in point. In the first one the statute had the words "wholly manufactured," and, giving effect to them, it was decided that boxes made from shooks imported from Canada, though nailed together and the sides of the boxes thus formed trimmed in the United States, were not boxes "wholly manufactured" in the United States, and entitled, upon being exported, to a drawback under a statute which allowed a drawback on



articles "wholly manufactured of materials imported." The Worthington Case was cited. In that case a duty was exacted upon "white hard enamel" under a statute which imposed a duty of 25 per cent. upon "watches, watch cases, watch movements, parts of watches and watch materials." This on the contention of the government that the enamel fell under the head of "watch materials." The contention was rejected; it being conceded that the enamel was used for many other purposes than for watch faces. In the Anheuser-Busch Case a claim of drawback upon corks exported with bottled beer was rejected. The ground of the claim was that the corks were subjected to a special treatment to be fit for use, and hence it was contended that they should be regarded as "imported materials" \* \* \* used in the manufacture of articles manufactured or produced in the United States—that is, the bottled beer. We replied "a cork put through the claimant's process is still a cork." The cases, therefore, do not sustain the contention for which they are cited.

[2] Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court and not remanding the case for a new trial. There

\*516

\*was no objection made to that action and no request for a remand of the case, and besides there was nothing to retry. The case involves only propositions of law.

Judgment affirmed.

Mr. Justice DAY and Mr. Justice VAN DEVANTER dissent.

(252 U. S. 152)  
NEW YORK CENT. R. CO. v. MOHNEY.

(Argued Jan. 27, 1920. Decided March 1, 1920.)

No. 196.

1. COMMERCE §47—VALIDITY OF RELEASE IN ANNUAL PASS BETWEEN POINTS WITHIN STATE GOVERNED BY STATE LAW.

Where a railroad employé, traveling on his employer's train from Toledo to Youngstown, used an annual pass good only between Toledo and Cleveland, intending to pay his fare in cash between Cleveland and Youngstown, between which points the train ran over the tracks of a different company, the validity of a release of liability for personal injuries contained in the pass was governed by the state law, though at Youngstown he intended to take another train of his employer for a point outside the state.

2. CONTRACTS §147(1)—TERMS CANNOT BE CHANGED BY PARTY'S MENTAL PURPOSE.

The mental purpose of one of the parties to a written contract cannot change its terms.

3. CARRIERS §280(7)—LIABLE TO PASSENGER FOR WILLFUL OR WANTON NEGLIGENCE NOTWITHSTANDING RELEASE IN PASS.

A railroad company was liable for an injury sustained by an employé traveling on a pass through its willful or wanton negligence, though the pass contained a release of liability for injuries.

On Writ of Certiorari to the Court of Appeals of Lucas County, State of Ohio.

Action by Wilbur H. Mohney against the New York Central Railway Company. A judgment for plaintiff was affirmed by the Ohio Court of Appeals, and defendant brings certiorari. Affirmed.

See, also, 248 U. S. 554, 39 Sup. Ct. 10, 63 L. Ed. 419.

Messrs. Howard Lewis, John H. Doyle, and Frederick W. Gaines, all of Toledo, Ohio, for petitioner.

Mr. Albert H. Miller, of Toledo, Ohio, for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

The respondent, whom we shall refer to as the plaintiff, brought suit against the petitioner, defendant, to recover damages for severe injuries which he sustained in a rear-end collision on defendant's railroad, which he averred was caused by the gross negli-

\*153

gence of the engineer of the train following that on which he was a passenger, in failing to look for and heed danger signals, which indicated that the track ahead was occupied. The plaintiff was employed by the defendant as an engineer, with a run between Air Line Junction, at Toledo, and Collingwood, a suburb of Cleveland, wholly within the state of Ohio. As an incident to his employment he was given an annual pass, good between Air Line Junction and Collingwood, which contained the release following:

"In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property, and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, and liable to him or her as such.

"And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used."

Having been informed that his mother had died at her home near Pittsburgh, Pa., the plaintiff, desiring to attend her funeral, applied to the defendant for, and obtained, a pass for himself and wife from Toledo to

Youngstown, Ohio, via Ashtabula, and was promised that another pass for himself and wife would be left with the agent of the company at Youngstown, good for the remainder, the interstate part, of the journey to Pittsburgh. But the line of the defendant via Ashtabula to Youngstown was much longer and required a number of hours more for the journey than it did to go via Cleveland, using the Erie Railroad from that city to Youngstown, and for this reason, the record shows,

\*154  
the plaintiff Mohney, \*before leaving home, decided that his wife should not accompany him and that he would make the journey by a train of the defendant, which used its own rails to Cleveland, and from Cleveland to Youngstown used the tracks of the Erie Railroad Company, and at Youngstown returned to the road of the defendant, over which it ran to Pittsburgh. The transportation which he had received via Ashtabula could not be used over the shorter route and therefore the plaintiff presented his annual pass for transportation from Toledo to Cleveland, intending to pay his fare from Cleveland to Youngstown over the Erie Railroad, leave the train at the Erie station at Youngstown, inquire by telephone as to the time and place of the burial of his mother, and then go to the New York Central station, a half mile away, obtain the pass which was to be left there for him, and go forward to Pittsburgh on the next convenient train.

The train on which Mohney was a passenger was wrecked between Toledo and Cleveland. It had come to a stop at a station and the second section of the train ran past two block signals, indicating danger ahead, and collided with the rear car of the first section, in which Mohney was riding, causing him serious injury.

The case was tried on stipulated facts and the testimony of the plaintiff. The trial court concluded that Mohney, at the time he was injured, was on an intrastate journey using an intrastate pass, and that by the law of Ohio the release upon it was void as against public policy. Thereupon, a jury being waived, the court entered judgment in plaintiff's favor.

The state Court of Appeals, differing with the trial court, concluded that Mohney was an interstate passenger when injured and that the release on the pass was valid, under the ruling in *Charleston Western Carolina Railway Co. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 904, 58 L. Ed. 1476. But the court went further and affirmed the judgment on

\*155  
two grounds; by a divided \*court, on the ground that the pass was issued to Mohney as part consideration of his employment, and, all judges concurring for the reason that "we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton." For these reasons it was held that the release on the pass did not constitute a defense to the action.

The Supreme Court of the state denied a motion for an order requiring the Court of Appeals to certify the record to it for review and the case is here on writ of certiorari.

The propriety of the use of the annual pass by Mohney for such a personal journey and that the release on it was not valid under Ohio law, were not questioned, and the sole defense urged by the railroad company was, and now is, that his purpose to continue his journey to a destination in Pennsylvania rendered him an interstate passenger, subject to federal law from the time he entered the train at Toledo and that the release on the pass was valid, under 234 U. S. 576, 34 Sup. Ct. 904, 58 L. Ed. 1476, *supra*.

The three freight cases on which the defendant relies for its contention that the plaintiff was an interstate passenger when injured, all proceed upon the principle that the essential character of the transportation and not the purpose, or mental state, of the shipper determines whether state or national law applies to the transaction involved.

Thus, in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, the owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the federal law until they had "been shipped, or entered with a common carrier for transportation to another state, or had been started upon such transportation in a continuous route or journey."

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young*, 219 U. S. 498, 527, 31 Sup. Ct. 279, 288 (55 L. Ed.

\*156  
310), the cotton seed \*cake and meal, although billed to Galveston, were "all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. \* \* \* The case, therefore, comes under *Coe v. Errol*, 116 U. S. 517 [6 Sup. Ct. 475, 29 L. Ed. 715]." The mental purpose of Young, and his attempted practice by intrastate billing, was to keep within the domain of the state law, but his contracts, express and implied, brought the discrimination complained of in the case within the scope of the Interstate Commerce Act.

In *Ohio Railroad Commission v. Worthington, Receiver*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004, the commission attempted to regulate the rate on "lake cargo coal," because it was often billed from the mines to Huron, or other ports within the state; but this court found that the established "lake cargo coal" rate was intended to apply, and in practice did apply, only "to such coal as was in fact placed on vessels for carriage beyond the state," and obviously "by every fair test, transportation of this coal from the mines



to upper lake ports is an interstate carriage." For this reason the enforcement of the order of the State Commission was enjoined as an attempt to regulate and control interstate commerce. Here again it was the committing of a designated kind of coal to a carrier for transportation in interstate commerce that rendered the federal law applicable.

[1, 2] To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collingwood, over a line of track wholly within

\*157

Ohio, and the company was charged \*with notice when it issued the pass that the public policy of that state rendered the release upon it valueless. The purpose of the plaintiff to continue his journey into Pennsylvania would have been of no avail in securing him transportation over the Erie Line to Youngstown, for that he must pay the published fare and very surely the release on the pass to Collingwood would not have attached to the ticket to Youngstown. Whether there was a similar release on the pass to Pittsburgh, which Mohney expected to get at Youngstown, the record does not disclose and it is of no consequence whether there was or not. The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. *Southern Pacific Co. v. State of Arizona*, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. For these reasons the judgment of the trial court was right and should have been affirmed.

But the Court of Appeals affirmed the judgment on two grounds, one of which was that all of the judges were "clearly of the opinion that the negligence in the case, under the evidence, was willful and wanton." This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained.

[3] A carrier by rail is liable to a trespasser or to a mere licensee willfully or wantonly injured by its servants in charge of its train (Commentaries on the Law of Negligence, Thompson, §§ 3307, 3308, and 3309, and the

same sections in White's Supplement thereto), and a sound public policy forbids that a less

\*158

onerous rule should be applied to a \*passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being who had intrusted his safety to defendant's keeping. *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 603, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901; *Chicago, Rock Island & Pacific Railway Co. v. Maucher*, 248 U. S. 359, 363, 39 Sup. Ct. 108, 63 L. Ed. 294.

The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of *Railroad Co. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. Ed. 1476, is applicable to an employé using a pass furnished to him seemingly as a necessary incident to his employment.

The judgment of the Court of Appeals is Affirmed.

Mr. Justice DAY and Mr. Justice VAN DE VANTER concur in the result, being of opinion that Mohney was using the annual pass in an interstate journey, and that to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass did not cover or embrace his injury, because the latter resulted from willful or wanton negligence, as to which such a clause is of no force or effect.

(251 U. S. 407)

## UNITED STATES v. THOMPSON.

(Argued Jan. 27 and 28, 1920. Decided March 1, 1920.)

No. 250.

1. COURTS ⇐385(1½) — IN DETERMINING WHETHER RULING WILL SUPPORT DIRECT WRIT OF ERROR BY GOVERNMENT, FORM OF RULING IS NEGLIGIBLE.

Whether a ruling sustaining a motion to quash an indictment constitutes a decision or judgment sustaining a special plea in bar, so as to authorize the government to take a direct writ of error to the Supreme Court, under Act March 2, 1907 (Comp. St. § 1704), is to be determined by its substance, and not by its form, and the fact that it took the form of granting a motion to quash is negligible.

2. COURTS ⇐385(1½) — RULING GRANTING MOTION TO QUASH HELD TO SUPPORT DIRECT WRIT OF ERROR BY GOVERNMENT AS "DECISION OR JUDGMENT SUSTAINING SPECIAL PLEA IN BAR."

A ruling sustaining a motion to quash an indictment, on the ground that the matters cov-

ered thereby had been submitted to and ignored by one grand jury, and resubmitted to another grand jury without leave of court, was reviewable on a direct writ of error taken by the government, under Act March 2, 1907 (Comp. St. § 1704), as a "decision or judgment sustaining a special plea in bar."

3. INDICTMENT AND INFORMATION  16—RE-SUBMISSION OF MATTERS TO ANOTHER GRAND JURY NOT GROUND FOR QUASHING INDICTMENT.

It was not ground for quashing an indictment that the matters thereby covered had been submitted to and ignored by one grand jury, and were then resubmitted to another grand jury without leave of court.

4. COURTS  337—STATE RULE AS TO RESUBMISSION OF MATTERS TO GRAND JURY NOT APPLICABLE TO FEDERAL COURTS.

The rule in Pennsylvania that, when a grand jury fails to find an indictment with respect to matters submitted to it, such matters cannot be resubmitted to another grand jury without leave of court, is not rendered applicable to the federal courts sitting in Pennsylvania by Rev. St. § 722 (Comp. St. § 1542), as that section provides for applying the state rule only in the absence of a federal rule.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Josiah V. Thompson was indicted for offenses. A motion to quash the indictment was sustained, and the United States brings error. Reversed and remanded.

\*408

\*Mr. W. C. Herron, of Washington, D. C., for the United States.

Mr. J. E. B. Cunningham, of Harrisburg, Pa., for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The Comptroller of the Currency, in January, 1915, closed the doors of the First National Bank of Uniontown, Pennsylvania. At the opening of the November term, 1915, of the court below, sitting at Pittsburgh, the attention of the grand jury was called by the court to alleged criminal acts connected with the administration of the affairs of the bank, and, following an investigation, the district attorney submitted to the grand jury a proposed indictment charging Thompson, the president of the bank, in 47 counts

\*409

with violations of the National Bank Act. The grand jury having concluded to indict only for the first 17 of said counts, the district attorney prepared an indictment embracing them and withdrew the other 30 from consideration. The bill thus drawn was submitted to the grand jury, by it presented as a true bill, and was ordered filed.

On March 17, 1916, the Attorney General of the United States, pursuant to the Act of June 30, 1906 (34 Stat. 816 [Comp. St. § 534]), appointed a special assistant for the purpose of co-operating with the district attorney in the matter of the steps to be taken to procure the indictment of Thompson. The next session of the court was held in March, 1916, at Erie, and the district attorney and the assistant to the Attorney General, without asking authority of the court, directed the attention of the grand jury to the charges against Thompson covered by the counts as to which the grand jury at Pittsburgh had failed to make a presentment, and after hearing witnesses called by the district attorney, the Erie grand jury on the 24th day of March, found a true bill containing 30 counts covering such charges. When this indictment was presented the court expressed doubt, in view of the fact that the charges had been submitted to a previous grand jury and no presentment had been made, whether there was any authority in the Erie grand jury, at the instance of the district attorney, to consider such charges without previously obtaining the consent of the court. However, the court observed that as the grand jury had reported a true bill, it would be placed on file, with the reservation of a right to take such future action regarding it as might be deemed appropriate.

Both indictments went upon the calendar for hearing, but that result was postponed from time to time in order to afford the accused an opportunity to prepare his defense. Finally in May, 1918, when both indictments were set for trial, a motion was made to

\*410

quash both, based, as far as concerned the Erie indictment, upon the ground that the grand jury had considered the subject of that indictment, not of its own motion, but upon the suggestion of the district attorney without any previous authority given him by the court. The motion was further supported by the assertion that the presentment of a true bill by the Erie grand jury was not made—

"from the personal knowledge of any of the grand jurors, nor from the testimony of witnesses sent before the grand jury by leave or by order of the court; that the knowledge upon which said presentment was so made came to said grand jury through the evidence of certain witnesses called before said grand jury by the United States attorney without the order or permission of the court; and the subject-matter of said presentment was not called to the attention of or given in charge or submitted to the grand jury by the court."

In addition, the motion averred that the 30 counts included in the Erie indictment covered the same offenses which were em-



braced by the 30 counts as to which the Pittsburgh grand jury had failed to find a true bill, and that the witnesses introduced by the district attorney at Erie were virtually the same witnesses previously by him introduced as to the same charges before the Pittsburgh grand jury.

The motion as to the Pittsburgh indictment was rejected and we put it out of view. That as to the Erie indictment was granted on the ground that the district attorney had no authority, after the action of the Pittsburgh grand jury, to resubmit the same matters to the Erie grand jury without the approval of the court, and that the Erie grand jury, for the same reason, had no authority to consider the subject. The court said:

"The resubmission of those matters to the later grand jury at the Erie term was without the knowledge or approval of the court. The resubmission of the offenses against the government to a new grand jury is a matter of

\*411

the \*highest prerogative, and is always subject to the control of the court, and, in proper cases, always granted by the court. \* \* \* Again, it appears \* \* \* that there was a special designation by the Attorney General, of some one, to attend the sessions of the grand jury at Erie and proceed with the investigation.

"We find, then, a subsequent introduction of the same matters to a later grand jury with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant. \* \* \*

"I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and, therefore, I must sustain the motion to quash the indictment found at Erie, and note an exception to the government.

"The court further wishes to state that the control of the grand jury by common law and by statute law is under the court and the proceedings are under the control of the court.

"Mr. Rush (the district attorney): May it please the court, the holding, then, of the court, as I understand it, is that the presentation of the case to the grand jury, which has been formerly ignored, would be a bar to a subsequent presentation, unless leave of court were granted.

"By the court: Without the permission of the court; yes. I think that is the law and that is what I have stated."

A rehearing was asked on the ground, among others, that if the allowance of the motion to quash were adhered to, the result would be to bar the right of the government to further prosecute for the offenses charged, as in consequence of the continuances which had been granted and the delay in making

\*412

the motion to quash, the statute of \*limitations would be operative. The rehearing was

denied, the court reiterating its previous rulings and pointing out that, as the Pittsburgh indictment had not been quashed, there was opportunity for the government to prosecute for the offenses therein charged, although its right to further prosecute the offenses charged in the Erie indictment would be lost.

This direct writ of error was then prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564 (34 Stat. 1246 [Comp. St. § 1704]), both parties agreeing, for the purposes of a motion to dismiss for want of jurisdiction, which we now consider, that under the circumstances here disclosed the authority to review must depend upon whether the quashing of the indictment was a "decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy."

[1, 2] As it is settled that this question is to be determined, not by form but by substance (United States v. Barber, 219 U. S. 72, 78, 31 Sup. Ct. 209, 55 L. Ed. 99; United States v. Openheimer, 242 U. S. 85, 37 Sup. Ct. 68, 61 L. Ed. 161, 3 A. L. R. 516), it follows that the fact that the ruling took the form of granting a motion to quash is negligible. Testing, then, the existence of jurisdiction by the substantial operation of the judgment, and assuming for the purpose of that test that the United States possessed the right to submit the indictment to the second grand jury without leave of court, which right was denied by the judgment below, we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment, but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based; and (b) because a like consequence resulted as to the authority of the district attorney and the powers of the grand jury, since the exercise

\*413

in \*both cases of lawful authority was barred by the application of unauthorized judicial discretion.

It is true it is argued that as the rights which the United States asserted were not possessed, the judgment did not bar the United States or the district attorney or the grand jury from the exercise of any lawful power. But this can only rest upon the assumption, that is there was no error in the judgment there is no power to review it, which, if its premise has any force, will be disposed of by the decision of the merits to which we now proceed.

The government urges that in the absence of statute of the United States giving such authority, the want of power in the court

to quash the indictment for the reasons by it stated, is clearly established by the following propositions, which in an elaborate argument it is insisted are made certain by a consideration of the common law, of the statutory law of the United States, of the practices from the beginning, and of the adjudications of this court which settle the question. The propositions are these:

(1) That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.

(2) That the United States district attorney, in virtue of his official duty and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token the duty of the district

\*414

attorney to direct the attention of a \*grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.

[3] We do not stop to review or even cite the extensive array of authorities from which the government deduces these propositions, but content ourselves with referring to the following cases and the authorities therein cited by which the propositions are sustained: *Hale v. Henkel*, 201 U. S. 43, 59-66, 26 Sup. Ct. 370, 50 L. Ed. 652; *Blair v. United States*, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed. 979. And see, with particular reference to the second proposition, *Weeks v. United States*, 216 Fed. 292, 297, 298, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524; *Creekmore v. United States*, 237 Fed. 743, 150 C. C. A. 497, L. R. A. 1917C, 845; *Abbott Bros. v. United States*, 242 Fed. 751, 155 C. C. A. 339; *Kelly v. United States*, 250 Fed. 947, 163 C. C. A. 197. To do more than to make this reference is unnecessary as in argument the abstract correctness of the propositions advanced by the government is conceded and the only controversy is as to their application, based upon the insistence that the present case is governed by an exception which exacts the necessity of procuring the prior approval of the court wherever a district attorney presents to one grand jury charges which a previous grand jury has ignored. The existence of this particular exception was expressly declared by the court below to be the basis for its decision. But we think the ruling, although it rested upon the assumption stated,

cannot be sustained, since the assumed exception is so incompatible with the general principles governing the subject as to cause it to be, in substance, not an exception at all, but, under the guise of an exception, a mere disregard or repudiation of the principles themselves, for the following reasons: In the first place, because while admitting the power of the grand jury, it yet denies such power, since it limits the right of that body to inquire by causing it to be unlawful for it to listen, without the approval of the court, to a suggestion of the district attorney

\*415

under the circumstances stated, and \*therefore causes any finding made to depend upon an inquiry as to the particular source of information which led to the investigation from which the finding resulted. In the second place, because, while conceding that the power of the grand jury is continuous, so that unfavorable action does not exhaust the authority of that or of another grand jury to examine, it limits or restrains thereafter the power of both to do so. In the third place, because, while the general rule which is stated establishes the authority of the district attorney as official prosecutor, and makes it, as we have seen, coterminous with the right of the grand jury to consider, the exception subjects that authority to the exercise of a judicial discretion, which, as well illustrated by the case under consideration, destroys it. In the fourth place, because, comprehensively considering the subject, the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

From the point of view of authority, the argument seeks to establish the existence of the exception upheld by the court below by a reference to a number of cases decided in Pennsylvania and in other states.<sup>1</sup> As to the Pennsylvania cases, they undoubtedly support the existence of the exception, not

\*416

in virtue of any statutory provision to \*that effect, but solely in contemplation of the common law of the state. But, in view of what we have just said concerning the error upon which the exception rests, its departure from the common law, its conflict with the settled

<sup>1</sup> *Rowand v. Commonwealth*, 82 Pa. 405; *Commonwealth v. Stoner*, 70 Pa. Super. Ct. 365; *Commonwealth v. Allen*, 14 Pa. Co. Ct. 546; *Commonwealth v. Whitaker*, 25 Pa. Co. Ct. 42; *Commonwealth v. Priestly*, 24 Pa. Co. Ct. 543; *People v. Neidhart*, 35 Misc. Rep. 191, 71 N. Y. Supp. 591; *People v. Clements*, 5 N. Y. Cr. R. 283; *People v. Dillon*, 197 N. Y. 254, 90 N. E. 820, 18 Ann. Cas. 552; *State v. Collins*, 73 Iowa, 542, 35 N. W. 625; *Sutton v. Commonwealth*, 97 Ky. 308, 30 S. W. 661; *People v. Warren*, 109 N. Y. 615, 15 N. E. 880; *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381.



rule applicable in the courts of the United States, as sustained by the decisions of this court, we are unable to accept the doctrine of the Pennsylvania cases as being even persuasively controlling.

As to the cases from other states which are relied upon as sustaining the exception, they are inapplicable because, with one or two exceptions, they rest exclusively upon the provisions of state statutes which on their face show intention to deviate from the general rule which otherwise would prevail at the common law.<sup>2</sup>

[4] It remains only to consider the contention that, irrespective of the want of persuasive power of the Pennsylvania cases, as the case in hand concerns the prosecution for a crime committed in Pennsylvania, even though it be a crime against the United States, the state rule, in virtue of the provisions of section 722 of the Revised Statutes of the United States (Comp. St. § 1542), was authoritatively controlling on the court below and is so controlling here. But the section relied upon provides for applying a state rule only where that course is required by an absence of federal rule on the subject. In view of the existence of a controlling federal rule which would be overthrown by applying the state law, the want of merit in the contention is so self-evident that we leave it without further notice.

The difference between calling into play a discretion for the purpose of prohibiting the performance of duties authorized by law, lest if their performance be permitted, they may be abused, and the exertion of a sound

\*417

discretion possessed, for the purpose of reasonably regulating the performance of duties by law imposed, serves, in the last analysis, to dispose of the arguments concerning the dangers of abuse of power which may result from a failure to uphold the existence of the discretion which the court below deemed it possessed and upon which its action was based.

As we have exercised jurisdiction to review on the writ of error, the prayer of the United States for the granting of a rule to show cause why mandamus and prohibition should not issue, if jurisdiction of the writ of error was not maintained, has nothing now to rest upon and it is denied. It further follows from what we have said on the merits that the judgment below must be and it is

Reversed and the cause remanded for further proceedings in conformity with this opinion.

<sup>2</sup> People v. Warren, 109 N. Y. 615, 15 N. E. 880; People v. Dillon, 197 N. Y. 254, 90 N. E. 820, 18 Ann. Cas. 552; Sutton v. Commonwealth, 97 Ky. 303, 34 S. W. 661; State v. Collins, 73 Iowa, 542, 35 N. W. 625; Rea v. State, 3 Okl. Cr. 281, 105 Pac. 386, 106 Pac. 382.

UNITED STATES v. UNITED STATES  
STEEL CORPORATION et al.

(Argued March 9, 12, 13, and 14, 1917. Restored to docket May 21, 1917. Reargued Oct. 7, 8, 9, and 10, 1919. Decided March 1, 1920.)

No. 6.

1. MONOPOLIES ⇐8—STATUTE NOT DIRECTED AGAINST MERE EXPECTATION OF MONOPOLY.

The Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830) is not directed against a mere expectation of monopoly, but against its realization.

2. MONOPOLIES ⇐12(1)—HOLDING CORPORATION NOT SUBJECT TO DISSOLUTION, WHERE MONOPOLY WAS NOT ACHIEVED AND LAW WAS NOT VIOLATED.

A holding company, organized by competing manufacturers of iron and steel, and which is greater in size and productive power than any of its competitors, and equal or nearly equal to them all, will not be dissolved under the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), where a monopoly was not thereby achieved, and it was not able to fix prices, and there was genuine, direct, and vigorous competition reflected in prices and production, and its attempts to persuade competitors, by means of pools, associations, trade meetings, etc., had been abandoned as futile prior to the institution of the suit, especially where it was not attacked for 10 years after its formation, during which millions of dollars had been spent and investments by the public invited and made, and a foreign trade developed that the government would not include in the decree of dissolution.

3. MONOPOLIES ⇐12(1)—PURCHASE OF PROPERTY OF COMPETITOR NOT VIOLATION OF LAW.

The purchase, by a corporation manufacturing steel and iron nearly equal in size and productive power to all of its competitors, of the property of a competitor, with the approval of the president, who believed the property nearly worthless in the hands of its then owner, was not a violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830).

4. MONOPOLIES ⇐24(2)—EVIDENCE AS TO EXISTENCE OF COMPETITION NOT OVERCOME BY OPINIONS.

The testimony of the officers, competitors, and customers of a company, charged with violating the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), that there was a genuine, direct, and vigorous competition reflected in prices and production, was not overruled by the opinions of an editor of a trade journal and an author and teacher of economics, who testified that, when prices were constant through a definite period, an artificial influence was indicated.

5. MONOPOLIES ⇐8—POWER NOT ILLEGAL, REGARDLESS OF PURPOSE.

The contention that power to fix prices is unlawful, regardless of purpose, cannot be sustained.

# 6. MONOPOLIES 24(2)--NATURE OF RELIEF RESTS WITH COURT.

Though the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830) requires the courts to prevent and restrain violations of the act, the command is necessarily submissive to the conditions which may exist, and the usual powers of a court of equity to adapt its remedies to those conditions, and the appropriate relief in each instance is for the determination of the court.

Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice Clarke dissenting.

Appeal from the District Court of the United States for the District of New Jersey.

Suit by the United States of America against the United States Steel Corporation and others. From a decree dismissing the bill (223 Fed. 55), the United States appeals. Affirmed.

Messrs. C. B. Ames, Asst. Atty. Gen., and Henry E. Colton, of Nashville, Tenn., for the United States.

Messrs. R. V. Lindabury, of Newark, N. J., David A. Reed, of Pittsburg, Pa., C. A. Severance, of St. Paul, Minn., and Geo. Woodward Murray, Kenneth B. Halstead, W. J. Curtis and Raynal C. Bolling, all of New York City, for appellees.

\*436

\*Mr. Justice McKENNA delivered the opinion of the Court.

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830).

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

Special charges of illegality and monopoly are made and special redresses and remedies are prayed, among others, that there be a

\*437

prohibition of stock ownership and exercise of rights under such ownership, and that there shall be such orders and distribution of the stock and other properties as shall be in accordance with equity and good conscience and "shall effectuate the purpose of the Anti-Trust Act." General relief is also prayed.

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel industry, 12 in number. There are, besides, other corporations and individuals more or less connected in the activities of the other defendants, that are alleged to be instruments or accomplices in their activities and offendings, and that these activities and offendings (speaking in general terms) extend from 1901 to 1911, when the bill

was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges, and we see at a glance what detail of circumstances may be demanded, and we may find ourselves puzzled to compress them into an opinion that will not be of fatiguing prolixity.

The case was heard in the District Court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. (D. C.) 223 Fed. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions, practically a compulsion from "the metallurgical method of making steel and the physical method of handling it," this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion

\*438

in independent action. And the "concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed an important purpose of the organization was the building up of the export trade in steel and iron which at that time was sporadic, the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation, but concentration of efforts, with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it was expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned and, while conceding that the Steel Corporation after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion, by Judge Woolley and concurred in by Judge Hunt (223 Fed. 161), was in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a



sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and

\*439

the corporation \*became "a combination of combinations by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80 per cent. or 90 per cent. of the entire output of the country, and that its purpose was to secure great profits which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.<sup>1</sup>

\*440

\*The organizers, however, (we are still rep-

<sup>1</sup> As bearing upon the power obtained and what the corporation did we give other citations from Judge Woolley's opinion as follows:

"The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord."

"Further inquiring whether the corporation inherently possesses monopolistic power attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent. to 40.9 per cent. and its increase of business during that period was but 40.6 per cent. of its original volume. Its increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors."

"From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either."

representing the opinion) underestimated the opposing conditions and at the very beginning the corporation instead of relying upon its own power sought and obtained the assistance and the cooperation of its competitors (the independent companies). In other words the view was expressed that the testimony did "not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in co-operation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary Dinners." The dinners were congregations of producers and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but their potency being demonstrated they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn the corporation's prices were controlled by competition."

The corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities

\*441

or tyrannies that the cases illustrate of \*other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employes—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below these maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not

different from theirs and was distinguished from "theirs only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, does not adequately

\*442

represent their ability and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed. The opinions indicate that the evidence admits of different deductions as to the genesis of the corporation and the purpose of its organizers, but only of a single deduction as to the power it attained and could exercise. Both opinions were clear and confident that the power of the corporation never did and does not now reach to monopoly, and their review of the evidence, and our independent examination of it, enables us to elect between their respective estimates of it, and we concur in the main with that of Judges Woolley and Hunt. And we add no comment except, it may be, that they underestimated the influence of the tendency and movement to integration, the appreciation of the necessity or value of the continuity of manufacture from the ore to the finished product. And there was such a tendency, and though it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. There was, therefore, much to urge it and give incentive to conduct that could accomplish it. From the nature and properties of the industry, the processes of production were something more than the stage and setting of the human activities. They determined to an extent those activities, furnished their motives, and gave test of their quality not, of course, that the activities could get any immunity from size, or resources, or energies, whether exerted in integrated plants or diversified ones.

The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances. But what are such circumstances? We have seen that it was the view of the District Court that size was such a circumstance and had no accusing or excusing influence. The contention of the government is to the contrary. Its assertion is that the size of the corporation being the result of a

\*443

"combination of powerful and able competitors" had become "substantially dominant" in the industry and illegal. And that this was determined. The companies combined,

is the further assertion, had already reached a high degree of efficiency, and in their independence were factors in production and competition, ceased to be such when brought under the regulating control of the corporation, which by uniting them offended the law, and that the organizers of the corporation "had in mind the specific purposes of the restraint of trade and the enormous profits resulting from that restraint."

It is the contention of the corporation opposing those of the government and denying the illegal purposes charged against it, that the industry demanded qualities and an enterprise that lesser industries do not demand and must have a corresponding latitude and facility. Indeed it is insisted that the industry had practically, to quote the words of Judge Buffington, he quoting those of a witness, "reached the limit, or nearly, at which economies from a metallurgical or mechanical standpoint could be made effective" and "that instead, as was then the practice, of having one mill make 10, or 20, or 50 products, the greatest economy would result from one mill making one product and making that product continuously." In other words that there was a necessity for integration, and rescue from the old conditions—from their improvidence and waste of effort—and that in redress of the conditions the corporation was formed; its purpose and effect being "salvage not monopoly," to quote the words of counsel. It was, is the insistence, the conception of ability, "a vision of a great business which should embrace all lines of steel and all processes of manufacture, from the ore to the finished product, and which by reason of the economies thus to be effected, and the diversity of products it would be able to offer, could successfully compete in all the markets of the world."

\*444

\*It is urged, further, that to the discernment of that great possibility was added a courage that dared attempt its accomplishment, and the conception and the courage made the formation of the corporation notable, but did not make it illegal.

We state the contentions, we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the District Judges, and we may well despair to supplement the force of their representation of the conditions antecedent to the formation of the corporation, and in what respect and extent its formation changed them. Of course, in that representation and its details there is guidance to decision, but they must be rightly estimated to judge of what they persuade. Our present purpose is, not retrospect for itself, however instructive, but practical decision upon existing conditions that we may not by their disturbance, produce, or even risk, consequences of a concern that cannot now be computed. In other words, our considera-



tion should be of, not what the corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced—whether its dissolution, as the government prays, or the dismissal of the suit, as the corporation insists.

[1, 2] The alternatives are perplexing, involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen, that the judges of the District Court unanimously concurred in the view that the corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed; not against an expectation of it, but against its realization, and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was

\*445

not achieved, and \*competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the corporation) until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the test for which *Swift & Co. v. United States*, 196 U. S. 396, 25 Sup. Ct. 276, 49 L. Ed. 518, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood, or were underestimated, and the case is not peculiar. And we may say in passing that the government cannot fear their resumption, for it did not avail itself of the offer of the District Court to retain jurisdiction of the cause in order that, if illegal acts should be attempted, they could be restrained.

What, then, can now be urged against the corporation? Can comparisons in other regards be made with its competitors and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the District Court unanimously resolved against the existence of that power, and in doing so they

but gave effect to the greater weight of the evidence. It is certain that no such power

\*446

\*was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretense, and the corporation, declined in productive powers—the competitors growing either against or in consequence of the competition. If against the competition we have an instance of movement against what the government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the corporation under either illustration is an untenable accusation.

[3] We may pause here for a moment to notice illustrations of the government of the purpose of the corporation, instancing its acquisition after its formation of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal; but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment, and he testified he was not deceived and that he believed that "the Tennessee Coal & Iron People had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it

\*447

\*would be a guaranty that there was value to it." Such being the emergency, it seems like an extreme accusation to say that the corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards and how? And what was the corporation to do with the property? Let it decay in desuetude, or develop its capabilities and resources? In the development, of course, there would be profit to the corporation; but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.

[4] From this digression we return to the

consideration of the conduct of the corporation to its competitors. Besides the circumstances which we have mentioned there are others of probative strength. The company's officers, and, as well, its competitors and customers, testified that its competition was genuine, direct, and vigorous and was reflected in prices and production. No practical witness was produced by the government in opposition. Its contention is based on the size and asserted dominance of the corporation—alleged power for evil, not the exertion of the power in evil. Or, as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the government, the offense against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the corporation. Competitors, it is said, followed the corporation's prices, because they made money by the imitation. Indeed, the imita-

\*448

tion is urged as "an evidence of the corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the corporation—"its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the corporation and the independents. Counsel say:

"They [the corporation is made a plural] called a few—they called 200 witnesses out of some 40,000 customers—and they expect with that customer evidence to overcome the whole train of price movement shown since the corporation was formed."

And by "movement of prices," counsel explained, "as shown by the published prices, \* \* \* they were the ones that the competitors were maintaining all during the interval."

It would seem that "200 witnesses" would be fairly representative. Besides the balance of the "40,000 customers" was open to the government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics, whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employé in the Bureau of Corporations. His deduction was that, when prices are constant through a definite period, an artificial influence is indicated; if they vary during such a

period, it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction,

\*449

equivocal of itself, even though the \*facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course, competition affects prices; but it is only one among other influences, and does not, more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers, and customers of the corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices, and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power, not of weakness, and power exerted, not only to suppress competition, but to compel testimony, is the necessary inference, shading into perjury, to deny its exertion? The situation is indeed singular, and we may wonder at it, wonder that the despotism of the corporation, so baneful to the world in the representation of the government, did not produce protesting victims.

[5] But there are other paradoxes. The government does not hesitate to present contradictions, though only one can be true; such being, we were told in our schoolbooks, the "principle of contradiction." In one, competitors (the independents) are represented as oppressed by the superior power of the corporation; in the other, they are represented as ascending to opulence by imitating that power's prices, which they could not do, if at disadvantage from the other conditions of competition, and yet confederated action is not asserted. If it were, this suit would take on another cast. The competitors would cease to be the victims of the corporation, and would become its accomplices. And

\*450

there is no other alternative. The suggestion that lurks in the government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The government, therefore, is reduced to the assertion that the size of the corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or, as the government says, "the combination embodied in the corporation unduly restrains competition by its *necessary effect* [the italics are the emphasis of the government], and therefore is unlawful regard-



less of purpose." "A wrongful purpose," the government adds, is "matter of aggravation." The illegality is static; purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant, because of the dominance attained? To such paternalism the government's contention, which regards power, rather than its use, the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

We have pointed out that there are several of the government's contentions which are difficult to represent or measure, and the one we are now considering—that is, the power is "unlawful regardless of purpose"—is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal, because there is potency in it for mischief. The re-

\*451

gression is extreme, but \*short of it the government cannot stop. The fallacy it conveys is manifest.

The corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offense against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it, except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade, nor complaints by customers—how can it be worked out of the situation, and through what proposition of law? Of course it calls for nothing other than a right application of the law, and, to repeat what we have said above, shall we declare the law to be that size is an offense, even though it minds its own business, because what it does is imitated? The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the government, and in connection with them, we recall

the distinction we made in the Standard Oil Case, 221 U. S. 1, 77, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, between acts done in violation of the statute and a condition brought about which "in and of itself, is not only a continued attempt to monopolize, but also a monopolization." In such case, we declared, "the duty to enforce the statute" required "the application of broader and more controlling" reme-

\*452

dies \*than in the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of "the combination found to exist in violation of the statute" in order to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained" had "brought" and would "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies, and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal, and became a "continually operating force" with the "possession of power unlawfully obtained."

[6] But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed; whatever there was of evil effect was discontinued before this suit was brought, and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies, and equally clear in its direction that the courts of the nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions, and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed, essential function—that makes its value in our jurisprudence—value in this case as in others. We do not mean to say that the law is not its own measure, and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is

\*453

certainly a \*matter for consideration that there was no legal attack on the corporation until 1911, 10 years after its formation and the commencement of its career. We do not, however, speak of the delay simply as to its time, or say that there is estoppel in it because of its time, but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken; the investments by the public that have been invited and are not to be ignored. And what of the foreign

trade that has been developed and exists? The government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that under congressional legislation in the Webb Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8836 $\frac{1}{4}$ -8836 $\frac{1}{4}$ e) the foreign trade of the corporation is reserved to it. And further, it is said, that the corporation has constructed a company called the Products Company, which can be "very easily preserved as a medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act."

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world, and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the corporation be sustained, and its power of control over its subsidiary companies be retained and exercised in the foreign trade, and given up in the domestic trade? The government presents no solution of the problem. Counsel realize the difficulty, and seem to think that its solution or its eval-

\*454

uation is in the suggestion \*that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action under existing laws, not action under conceptions which may never be capable of legal execution. We must now decide, and we see no guide to decision in the propositions of the government.

The government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business. The companies are enumerated. They are the Carnegie Steel Company (a combination of the old Carnegie Company, the National Steel Company, and the American Steel Company), the Federal Steel Company, the Tennessee Company, and the Union Steel Company (a combination of the Union Steel Company of Donora, Pa., Sharon Steel Company of Sharon, Pa., and Sharon Tin Plate Company). They are fully integrated, it is said—possess their own supplies, facilities of transportation, and distribution. They are subject to the Steel Corporation, is in effect the declaration, in nothing but its control of their prices. We may say parenthet-

ically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expedients of the law.

But let us see what guide to a procedure of dissolution of the corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the government calls for, not only a disruption of present conditions, but the restoration of the conditions of 20 years ago, if

\*455

\*not literally, substantially. Is there guidance to this in the Standard Oil Case and the Tobacco Case, 31 Sup. Ct. 632, 55 L. Ed. 663? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them, and this reference to them is enough. And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent \* \* \* and impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how in the case of the New Jersey corporation the original wrong was reflected in and manifested by the acts which followed the organization, as described by the court. It said:

"The exercise of the power which resulted from that organization fortifies the foregoing

\*456

conclusions (as to monopoly, etc.), since the \*development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed



and brought under control, the system of marketing which was adopted, by which the country was divided into districts and the trade in each district in oil was turned over to the designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The Tobacco Company Case (31 Sup. Ct. 632, 55 L. Ed. 663) has the same bad distinctions as the Standard Oil Case. The illegality in which it was formed [there were two American Tobacco Companies, but we use the name as designating the new company as representing the combinations of the suit] continued—indeed, progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion, if not its direct assertion, that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war "inspired by one or more of the minds which brought about and became parties to that combination." In other words, the purpose of the combination was signaled to competitors, and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven "out of the business." This was the purpose, and the achievement, and the processes by which achieved, this court enumerated to be the formation of new companies, taking stock in others to "obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants, not to utilize them, but to

\*457

close them; by constantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders, or employés, were required to bind themselves, generally for long periods, not to compete in the future. In the Tobacco Case (31 Sup. Ct. 632, 55 L. Ed. 663), therefore as in the Standard Oil Case, the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the Standard Oil Case furnishes no example for a decree in this.

In conclusion, we are unable to see that the public interest will be served by yielding to the contention of the government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be

serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.

Mr. Justice McREYNOLDS and Mr. Justice BRANDEIS took no part in the consideration or decision of the case.

Mr. Justice DAY, dissenting.

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act. I am unable to accept

\*458

the conclusion \*which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

It appears to be thoroughly established that the formation of the corporations, here under consideration, constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. I agree with the conclusions of Judges Woolley and Hunt, expressed in the court below (223 Fed. 161 et seq.), that the combinations were not submissions to business conditions but were designed to control them for illegal purposes, regardless of other consequences, and "were made upon a scale that was huge and in a manner that was wild," and "properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them." Those judges found that the constituent companies of the United States Steel Corporation, nine in number, were themselves combinations of steel manufacturers, and the effect of the organization of these combinations was to give a control over the industry at least equal to that theretofore possessed by the constituent companies and their subsidiaries; that the Steel Corporation was a combination of combinations by which directly or indirectly 180 independent concerns were brought under one control, and in the language of Judge Woolley (167):

"Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or \* \* \* business values, as independent and separate producers, but upon their values in combination; that is, upon their values as manufactur-

\*459

ing plants and business \*concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess

of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related measured by the amount of production, extended in some instances from 80 per cent. to 95 per cent. of the entire output of the country, resulting in the immediate increase of prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.

"The immediate, as well as the normal effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade."

The enormous overcapitalization of companies and the appropriation of \$100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the profits of the business. This record shows that the power obtained by the corporation brought under its control large competing companies which were of themselves illegal combinations, and succeeded to their power; that some of the organizers of the Steel Corporation were parties to the preceding combinations, participated in their illegality, and by uniting them under a common direction intended to augment and perpetuate their power. It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. Nothing could add to the vivid accuracy with which Judge Woolley, speaking

\*460

for himself \*and Judge Hunt, has stated the illegality of the organization, and its purpose to combine in one great corporation the previous combinations by a direct violation of the purposes and terms of the Sherman Act.

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called "Gary Dinners," where the assembled trade opponents secured co-operation and joint action through the machinery of special committees of competing concerns, and by prudent prevision took into account the possibility of defection, and the means of controlling and perpetuating that industrial harmony which arose from the control and maintenance of prices.

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. The power, thus obtained from the combination of resources almost unlimited in the aggregation of competing organizations, had within its control the domination of the trade, and the ability to

fix prices and restrain the free flow of commerce upon a scale heretofore unapproached in the history of corporate organization in this country.

These facts established, as it seems to me they are by the record, it follows that if the Sherman Act is to be given efficacy, there must be a decree undoing so far as is possible that which has been achieved in open, notorious, and continued violation of its provisions.

I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legiti-

\*461

mately goes with it, provided no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 676, 677, 16 Sup. Ct. 705, 40 L. Ed. 838; *Trans-Missouri Freight Ass'n Case*, 166 U. S. 290, 324, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Northern Securities Case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291, 25 Sup. Ct. 493, 49 L. Ed. 739; *Union Pacific Case*, 226 U. S. 61, 88, 33 Sup. Ct. 53, 57 L. Ed. 124. While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which from their nature, or effect, have proved effectual to restrain interstate commerce. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632,



55 L. Ed. 663; *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; *Straus v. American Publishers' Ass'n*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; *Eastern States Lumber Association v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

This statute has been in force for nearly 30 years. It has been frequently before this court for consideration, and the nature and

\*462

character of the relief to be granted \*against combinations found guilty of violations of it have been the subject of much consideration. Its interpretation has become a part of the law itself, and if changes are to be made now in its construction or operation, it seems to me that the exertion of such authority rests with Congress and not with the courts.

The fourth section is intended to give to courts of equity of the United States the power to effectively control and restrain violations of the act. In none of the cases which have been before the courts was the character of the relief to be granted, where organizations were found to be within the condemnation of the act, more thoroughly considered than in the *Standard Oil and Tobacco Company Cases* reported in 221 U. S. In the former case, considering the measure of relief to be granted in the case of a combination, certainly not more obnoxious to the Sherman Act than the court now finds the one under consideration to be, this court declared that it must be twofold in character (221 U. S. 78, 31 Sup. Ct. 523, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734):

"(1) To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. (2) The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In the *American Tobacco Company Case* the nature of the relief to be granted was again given consideration, and it was there concluded that the only effectual remedy was to dissolve the combination and the companies comprising it, and for that purpose the cause was remanded to the District Court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which should be in honest harmony with and not

\*463

repugnant to the law." In that \*case the corporations dissolved had long been in existence, and the offending companies were organized years before the suit was brought and before the decree of dissolution was finally made. Such facts were considered no valid objection to the dissolution of these power-

ful organizations as the only effective means of enforcing the purposes of the Sherman Anti-Trust Act. These cases have been frequently followed in this court, and in the lower federal courts, in determining the nature of the relief to be granted, and I see no occasion to depart from them now.

As I understand the conclusions of the court, affirming the decree directing dismissal of the bill, they amount to this: That these combinations, both the holding company and the subsidiaries which comprise it, although organized in plain violation and bold defiance of the provisions of the act, nevertheless are immune from a decree effectually ending the combinations and putting it out of their power to attain the unlawful purposes sought, because of some reasons of public policy requiring such conclusion. I know of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able to thus organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself.

There is no mistaking the terms of the act as they have hitherto been interpreted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. The remedy by injunction, at the instance of the Attorney

\*464

General, was \*given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combinations and contracts, and this court interpreting its provisions has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed. I am unable to see force in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of \$1,800,000,000; its outstanding capital stock was \$868,583,600; its surplus \$151,798,428. Its cash on hand ordinarily was \$75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and with a single exception, the total capitalization and

surplus of any one of them. That such an organization thus fortified and equipped could if it saw fit dominate the trade and control competition would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past, that is, to effectually dominate and control the steel business of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit

\*465

their formation, \*and when formed to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute and in most cases practically impossible. As we said in dealing with the Packers' combination in *Swift & Co. v. United States*, 196 U. S. 396, 25 Sup. Ct. 279, 49 L. Ed. 518:

"Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peachie*, 177 Mass. 267, 272 [59 N. E. 55]. But when that intent and the consequent dangerous probability exist, this statute [Sherman Act] like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

It is affirmed that to grant the government's request for a remand to the District Court for a decree of dissolution would not result in a change in the conditions of the steel trade. Such is not the theory of the Sherman Act. The act was framed in the belief that attempted or accomplished monopolization, or combinations which suppress free competition were hurtful to the public interest, and that a restoration of competitive conditions would benefit the public. We have here a combination in control of one-half of the steel business of the country. If the plan were followed, as in the *American Tobacco Case*, of remanding the case to the District Court, a decree might be framed restoring competitive conditions as far as practicable. See *United States v. American Tobacco Co.* (C. C.) 191 Fed. 371. In that case the subject of reconstruction so as to restore such con-

\*466

ditions was elaborated and carefully considered. In my judgment the principles there laid down, if followed now, would make a very material difference in the steel industry. Instead of one dominating corporation, with scattered competitors, there would be competitive conditions throughout the whole trade which would carry into effect the policy of the law.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court, should not be dismissed, and the cause should be remanded to the District Court, where a plan of effective and final dissolution of the corporations should be enforced by a decree framed for that purpose.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in this dissent.

(251 U. S. 532)

FT. SMITH LUMBER CO. v. STATE OF ARKANSAS ex rel. ARBUCKLE,  
Atty. Gen.

(Submitted Jan. 5, 1920. Decided March 1, 1920.)

No. 394.

1. CONSTITUTIONAL LAW §283—TAXATION  
§47(1)—DOUBLE TAXATION NOT PROHIBITED BY FEDERAL CONSTITUTION.

Const. U. S. Amend. 14, does not forbid double taxation, short of confiscation, or proceedings unconstitutional on other grounds.

2. CONSTITUTIONAL LAW §229(1) — TAXATION  
§195—STATE MAY TAX CORPORATIONS ON STOCK OF OTHER CORPORATIONS THOUGH INDIVIDUALS ARE NOT SO TAXED.

The state may, without violating Const. U. S. Amend. 14, tax its own corporations in respect to stock held by them in other domestic corporations, though individual stockholders are exempt.

3. CONSTITUTIONAL LAW §229(1)—TAXATION  
§537—STATE MAY LIMIT RECOVERY OF BACK TAXES TO THOSE DUE FROM CORPORATIONS.

A state may without violating Const. U. S. Amend. 14, confine the recovery of back taxes to those due from corporations.

4. COURTS §394(4) — FEDERAL SUPREME COURT CANNOT REVIEW QUESTIONS UNDER STATE CONSTITUTION.

Supposed limitations on the power of the state Legislature in the Constitution of the state are not reviewable in the federal Supreme Court on writ of error to a state court.

Mr. Justice McKenna, Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Reynolds, dissenting.



In Error to the Supreme Court of the State of Arkansas.

Suit by the State of Arkansas, on relation of John D. Arbuckle, Attorney General, against the Ft. Smith Lumber Company. A judgment for plaintiff was affirmed by the Supreme Court of Arkansas (211 S. W. 662), and defendant brings error and petitions for certiorari. Judgment affirmed, and certiorari denied.

\*533

\*Messrs. Joseph M. Hill and Henry L. Fitzhugh, both of Ft. Smith, Ark., for plaintiff in error.

Messrs. John D. Arbuckle and George Vaughan, both of Little Rock, Ark., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the State of Arkansas against the plaintiff in error, a corporation of the State, to recover back taxes alleged to be due upon a proper valuation of its capital stock. The corporation owned stock in two other corporations of the State each of which paid full taxes and it contended that it was entitled to omit the value of such stock from the valuation of its own. This omission is the matter in dispute. The corporation defends on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the Fourteenth Amendment. The case was heard on demurrer to the answer and agreed facts, and the statute levying the tax was sustained by the Supreme Court of the State.

[1, 2] The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds. *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137,

6 Sup. Ct. 645, 29 L. Ed. 830; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367, 368, 35 Sup. Ct. 99, 59 L. Ed. 265. We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by

\*534

them \*in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation. *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, 32 Sup. Ct. 192, 56 L. Ed. 350. If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.

[3, 4] The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See *New York ex rel. New York Clearing House Building Co. v. Barker*, 179 U. S. 279, 283, 21 Sup. Ct. 121, 45 L. Ed. 190. We have nothing to do with the supposed limitations upon the power of the State Legislature in the Constitution of the State. Those must be taken to be disposed of by the decisions of the State Court. As this case properly comes here by writ of error, an application for a writ of certiorari that was presented as a precaution will be denied.

Judgment affirmed.

Mr. Justice McKENNA, Mr. Justice DAY, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS, dissent.

(252 U. S. 107)

McCLOSKEY v. TOBIN, Sheriff.

(Submitted Nov. 12, 1919. Decided March 1, 1920.)

No. 79.

CONSTITUTIONAL LAW §87, 275(1)—PROHIBITING SOLICITATION OF EMPLOYMENT TO COLLECT CLAIMS NOT VIOLATIVE OF RIGHT TO LIBERTY OR EQUAL PROTECTION.

Though, under the law of Texas, causes of action in tort as well as in contract are assignable, Pen. Code Tex. 1911, art. 421, as amended by Laws Tex. 1917, c. 133, § 1 (Vernon's Ann. Pen. Code Supp. Tex. 1918, art. 421), forbidding the personal solicitation of employment to prosecute, defend, present, or collect any claim, is a reasonable regulation of the business of obtaining adjustment of claims and does not violate rights of liberty and property, or deny the equal protection of the laws, in violation of the Fourteenth Amendment.

In Error to the Court of Criminal Appeals of the State of Texas.

Habeas corpus by Frank P. McCloskey against John W. Tobin, Sheriff of Bexar County, Tex. The writ was denied by the county court and the Court of Criminal Appeals (199 S. W. 1101), and plaintiff brings error. Affirmed.

Mr. R. H. Ward, of Wichita Falls, Tex., for plaintiff in error.

Messrs. Luther Nickels, of Eastland, Tex., and B. F. Looney, of Greenville, Tex., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Article 421 of the Penal Code of Texas defined, with much detail, the offense of barratry. In *McCloskey v. San Antonio Traction Co.* (Tex. Civ. App.) 192 S. W. 1116, a decree for an injunction restraining the plaintiff in error from pursuing the practice of fomenting and adjusting claims was reversed on the ground that this section had superseded the common law offense of barratry and that by the Code "only an attorney at law is forbidden to solicit employment in any suit himself or by an agent." Article 421 was then amended (Act March 29, 1917, c. 133 [Vernon's Ann. Pen. Code Supp. Tex. 1918, art. 421]) so as to apply to any person

\*108

who "shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment. \* \* \* Thereafter McCloskey was arrested on an information which charged him with soliciting employment to collect two claims, one for personal injuries, the other for painting a buggy. He applied for a writ of habeas corpus, which was denied both by the county court and the

Court of Criminal Appeals. The case comes here under section 237 of the Judicial Code (Comp. St. § 1214); McCloskey having claimed below, as here, that the act under which he was arrested violates rights guaranteed him by the Fourteenth Amendment.

The contention is that, since the state had made causes of action in tort as well as in contract assignable (*Railway v. Ginther*, 96 Tex. 295, 72 S. W. 166), they had become an article of commerce; that the business of obtaining adjustment of claims is not inherently evil; and that therefore, while regulation was permissible, prohibition of the business violates rights of liberty and property and denies equal protection of the laws. The contention may be answered briefly. To prohibit solicitation is to regulate the business, not to prohibit it. Compare *Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. Co. Litt. p. 368 (Day's Edition, 1812, vol. 2, § 701 [368, b]); 1 Hawkins, Pleas of the Crown (6th Ed.) 524; *Peck v. Heurich*, 167 U. S. 624, 630, 17 Sup. Ct. 927, 42 L. Ed. 302. Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related is obviously reasonable. *Ford v. Munroe* (Tex. Civ. App.) 144 S. W. 349. The statute is not open to the objections urged against it. Affirmed.

(252 U. S. 100)

MILWAUKEE ELECTRIC RY. & LIGHT CO. v. STATE OF WISCONSIN ex rel. CITY OF MILWAUKEE.

(Argued Nov. 10, 1919. Decided March 1, 1920.)

No. 55.

1. COURTS §369(1)—SUPREME COURT MUST ITSELF DECIDE EXISTENCE OF CONTRACT CLAIMED TO BE IMPAIRED.

In deciding whether state legislation impairs the obligation of a contract, the federal Supreme Court must determine for itself whether there is a contract and what its obligation is, as well as whether the obligation has been impaired.

2. COURTS §369(1)—SUPREME COURT WILL NOT OVERRULE STATE DECISION CONSTRUING CONTRACT CLAIMED TO BE IMPAIRED.

That without the decision of the state court, as to the construction of the contract said to have been impaired, the Supreme Court might have hesitated to adopt such construction, is not enough to lead it to overrule such decision upon a fairly doubtful point.



3. STREET RAILROADS ⇨38—FRANCHISE HELD NOT TO REQUIRE CITY TO BEAR WHOLE COST OF REPAVING WITH DIFFERENT MATERIAL.

A provision of a street railway franchise requiring the railway company to keep in good repair a specified portion of the street with the same material as the city should have last used to pave or repave such portion, and the street previous to such repairs, did not place on the city the burden of paving the whole street with asphalt, where the original paving was of macadam.

4. MANDAMUS ⇨167—ALLEGATIONS NOT EXPRESSLY ADMITTED ARE COVERED BY GENERAL DENIAL IN RETURN.

An allegation not expressly admitted by the return to a writ of mandamus must be deemed covered by its general denial of all allegations not expressly admitted.

5. STREET RAILROADS ⇨38—MATERIAL FOR REPAVING TO BE DETERMINED BY CITY AUTHORITIES.

Where a street railway franchise requiring the railway to repave a specified portion of the street did not, as a matter of contract, preclude regulation in respect to paving, it was for the city to determine in the first instance what kind of paving the public necessity and convenience demanded.

6. STREET RAILROADS ⇨38—REQUIRING REPAVING WITH ASPHALT INSTEAD OF MACADAM NOT UNREASONABLE.

Where a street railway franchise imposed on the railroad the obligation of repaving a specified portion of the street when the street was to be repaved, it was not an inherently arbitrary or unreasonable requirement to provide that such portion of the street be paved, like the rest of the street, with asphalt upon a concrete foundation, instead of macadam, with which the street was originally paved.

7. STREET RAILROADS ⇨38—LOW EARNINGS NOT EXCUSE FOR FAILURE TO REPAVE.

While the financial condition of a public service corporation is a fact properly to be considered, when determining the reasonableness of an order directing an unremunerative extension of facilities or forbidding their abandonment, the mere fact that a street railway is not earning 6 per cent. on the value of its property does not relieve it of the obligation voluntarily assumed by its franchise to keep a specified portion of the street in repair.

8. CONSTITUTIONAL LAW ⇨209—EQUAL PROTECTION NOT DENIED BY INCONSISTENT DECISIONS.

A street railway company was not denied the equal protection of the laws by a decision of the state Supreme Court that its franchise imposed on it the obligation to repave a specified portion of the street, though it subsequently rendered a contrary decision with respect to a different street railway company, conceding the similarity of the ordinances and conditions, as the Fourteenth Amendment does not insure uniformity of judicial decisions.

Mr. Justice Pitney and Mr. Justice McReynolds dissenting.

In Error to the Supreme Court of the State of Wisconsin.

Mandamus by the State of Wisconsin, on relation of the City of Milwaukee, against the Milwaukee Electric Railway & Light Company. A judgment awarding a peremptory writ was affirmed by the Supreme Court of Wisconsin (166 Wis. 163, 164 N. W. 844), and defendant brings error. Affirmed.

\*101

\*Mr. Edward S. Mack, of Milwaukee, Wis., for plaintiff in error.

Mr. Clifton Williams, of Milwaukee, Wis., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

A petition for a writ of mandamus was brought by the city of Milwaukee in a lower

\*102

court of the state of Wisconsin to compel the Milwaukee Electric Railway & Light Company to pave at its own expense with asphalt upon a concrete foundation that portion of Centre street, called the railway zone, which lies between the tracks and for one foot outside of them. The paving had been specifically ordered on November 8, 1915, by a city ordinance after the city had laid such a pavement on all of the street except the railway zone. Theretofore the street had been paved from curb to curb with macadam. The company admitted that the railway zone was in need of repaving at that time; but it insisted that under an ordinance of January 2, 1900, which constituted its franchise to lay tracks on Centre street, it was entitled to repair with macadam and could not be compelled to repave with asphalt.

The case was heard in the trial court on a demurrer to the amended return. The demurrer was sustained, and the decision was affirmed by the Supreme Court. 165 Wis. 230, 161 N. W. 745. The company having failed after remittitur to file an amended return or take further action, judgment was entered by the trial court awarding a peremptory writ of mandamus directing it to pave the railway zone as directed in the ordinance. This judgment also was affirmed by the Supreme Court. 166 Wis. 163, 164 N. W. 844. The case comes here on writ of error under section 237 of the Judicial Code (Comp. St. § 1214). The single question presented is whether the ordinance of November 8, 1915, is void either under section 10 of article 1 of the federal Constitution, as impairing contract rights of the company, or under the Fourteenth Amendment, as depriving it of property without due process of law. The ordinance of January 2, 1900, which is the contract alleged to be impaired by the later ordinance, provides as follows:

"Sec. 2. \* \* \* It shall be the duty of said railway company at all times to keep in good

repair the roadway between the rails and for one foot on the outside of each rail \*as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. \* \* \*

The company contends that when this section is read in connection with section 9, it clearly appears that the obligation to repave cannot be imposed.

[1-3] First. The Supreme Court of the state held that the language of section 2 was not distinguishable from that involved in earlier cases in which it had held that a duty to keep "in proper repair" without qualification was broad enough to require repaving and repairing with the same material with which the street was repaved. When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is as well as whether the obligation has been impaired. *Detroit United Railway v. Detroit*, 242 U. S. 238, 249, 37 Sup. Ct. 87, 61 L. Ed. 268. But, as stated in *Southern Wisconsin Railway v. Madison*, 240 U. S. 457, 461, 36 Sup. Ct. 400, 401 (60 L. Ed. 739):

"The mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

Among the cases relied upon by the state court is *State ex rel. Milwaukee v. Milwaukee Electric Railway & Light Co.*, 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 123, which was cited by this court in the *Madison Case*, 240 U. S. 461, 36 Sup. Ct. 402 (60 L. Ed. 739), as a "persuasive decision that the obligation to keep the space 'in proper repair' \* \* \* extends to" repaving the railway zone with asphalt when the rest of the street is being repaved with that material. But the company points to the clause in the ordinance of January 2, 1900, which provides for repair "with the same material as the city shall have last used to pave or repair these spaces

and the streets," \*and insists that its obligation is, in any event, limited to repaving with such material as the city had last used between the rails. This would put upon the city the burden of paving the whole street in case of any innovation in paving save by agreement of the company and the city. It is not a reasonable construction of the provision.

[4-6] Second. Granted the duty to repave, and to repave with material other than that last used in the space between the tracks, was

it reasonable for the city to require that the pavement be of asphalt upon a concrete foundation—a pavement which involved larger expense? The city alleged in its petition that the use of macadam by the railway was unreasonable, and that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt, so as to prevent water from seeping through under the asphalt, causing it to deteriorate in warm weather and to be lifted by freezing in cold weather. The allegation was not expressly admitted by the return and must be deemed to have been covered by its general denial of all allegations not expressly admitted; but neither party took steps to have this formal issue disposed of. The case differs, therefore, in this respect from the *Madison Case*, where there was an express finding that repavement of the railway zone with stone would have been unsuitable when the rest of the street was of asphalt. 240 U. S. 462, 36 Sup. Ct. 400 (60 L. Ed. 739). The difference is not material. As the ordinance did not, as a matter of contract, preclude regulation in respect to paving, it was for the city to determine, in the first instance, what the public necessity and convenience demanded. Compare *Fair Haven & Westville Railroad Co. v. New Haven*, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. Ed. 237. We cannot say that its requirement that the railway zone be paved like the rest of the street with asphalt upon a concrete foundation was inherently arbitrary or unreasonable.

[7] Third. The company insists that the

ordinance of \*November 8, 1915, is unreasonable and void, also, for an entirely different reason. It alleges in its return that for a long time prior to that date the earnings from its street railway system in Milwaukee were considerably under 6 per cent. of the value of the property used and useful in the business and were less than a reasonable return. It contends that this allegation was admitted by the demurrer; and that to impose upon the company the additional burden of paving with asphalt will reduce its income below a reasonable return on the investment and thus deprive it of its property in violation of the Fourteenth Amendment. The Supreme Court of the state answered the contention by saying:

"The company can at any time apply to the Railroad Commission and have the rate made reasonable."

The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension of facilities or forbidding their abandonment. *Mississippi Railroad Commission v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 37 Sup. Ct.



602, 61 L. Ed. 1216; New York & Queen's Gas Co. v. McCall (245 U. S. 345, 350, 38 Sup. Ct. 122, 62 L. Ed. 337. But there is no warrant in law for the contention that merely because its business fails to earn full 6 per cent. upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power. Compare Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, 279, 30 Sup. Ct. 330, 54 L. Ed. 472; Chicago, Rock Island & Pacific Railway v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290; Missouri Pacific Railway v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157.

[8] Fourth. The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below the Supreme Court of the state has decided *Superior v. Duluth Street Railway Co.*, 166 Wis. 487, 165 N. W. 1081, which the company alleges is not reconcilable with

\*106

\*its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 569, 18 Sup. Ct. 445, 42 L. Ed. 853), any more than in guaranteeing due process it assures immunity from judicial error (*Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; *Tracy v. Ginsberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755). Unlike *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520, and *Muhlker v. New York*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

As we conclude that there was a contractual duty to repave arising from the acceptance of the franchise, we have no occasion to consider whether there was, as contended, also a statutory duty to do so arising under section 1862, Wisconsin Statutes, which provides that street railways shall "be subject to such reasonable rules and regulations \* \* \* as the proper municipal authorities may by ordinance, from time to time prescribe."

Affirmed.

Mr. Justice PITNEY and Mr. Justice McREYNOLDS dissent.

(253 U. S. 112)

# GRAND TRUNK WESTERN RY. CO. v. UNITED STATES.

(Argued Jan. 21 and 22, 1920. Decided March 1, 1920.)

No. 153.

## 1. POST OFFICE $\S$ 21(4) — OVERPAYMENT OF LAND-AIDED RAILROAD IS UNAUTHORIZED AND SHOULD BE RECOVERED.

If a railroad was land-aided, payment of more than 80 per cent. of the full rates for the carriage of mails otherwise provided by law was unauthorized, and it was the duty of the Postmaster General to seek recovery of the overpayment under Rev. St.  $\S$  4057 (Comp. St.  $\S$  7606), relative to recovery of moneys wrongfully paid out of the funds of the post office department.

## 2. POST OFFICE $\S$ 21(4)—OVERPAYMENT FOR CARRYING MAILS MAY BE RECOVERED BY DEBIT IN LATER ACCOUNT.

Balances due railroads for carrying the mails although arising under successive quadrennial contracts are regarded as running accounts, and overpayments may be recovered by means of a later debit in the accounts, no matter how long a time may have elapsed before the error is discovered and the recovery attempted.

## 3. LIMITATION OF ACTIONS $\S$ 11(1) — DOES NOT ORDINARILY RUN AGAINST THE UNITED STATES.

The statute of limitations does not ordinarily run against the United States.

## 4. POST OFFICE $\S$ 21(4)—RULE AS TO CHANGE OF DEPARTMENTAL CONSTRUCTION NOT APPLICABLE TO OVERPAYMENT OF RAILROAD DUE TO MISTAKE OF FACT.

The rule that when a department charged with the execution of a statute gives it a construction and acts upon that construction uniformly for a series of years the courts will look with disfavor upon a change whereby parties who have contracted with the government upon the faith of that construction would be injured did not apply to overpayments to a railroad for carrying the mails, due to a mistake of fact as to whether it was a land-aided railroad.

## 5. POST OFFICE $\S$ 21(4)—DUTY OF LAND-AIDED RAILROADS AS TO CARRYING MAILS AFFECTS EVERY CARRIER THOUGH RECEIVING NONE OF THE LAND.

The obligation of a land-aided railroad to carry the mails at 80 per cent. of the rates otherwise payable attaches to the road like an easement or charge, and affects every carrier thereafter using the railroad, whatever the nature of its tenure, though it received none of the land and obtained no benefit from the grant.

## 6. POST OFFICE $\S$ 21(4)—WHETHER RAILROAD RECEIVING LAND GRANT WAS IN FACT AIDED THEREBY IN CONSTRUCTING ROAD WAS IMMATERIAL.

Where a railroad company applied for land to aid in the construction of its road to the

state to which land had been granted by Congress for that purpose, and accepted a patent reciting that such was the purpose of the conveyance, and expressly assented to the terms and conditions of the grant imposed by act of Congress, and disposed of the land while it remained the owner of the railroad, it was immaterial, with respect to its obligation to carry the mails at the price fixed by Congress, whether or not it was in fact aided by the land grant in constructing its road.

7. PUBLIC LANDS ⇨68—RAILROAD COMPANY HELD AUTHORIZED TO ASSENT TO CONDITIONS OF GRANT IN AID OF CONSTRUCTION.

A railroad company, authorized by its charter to receive a land grant, was necessarily authorized to assent to the conditions upon which alone the grant could be made under the act of Congress granting the land to the state for that purpose.

8. POST OFFICE ⇨21(4)—COMPANY CLAIMING UNDER RAILROAD MORTGAGE NOT IN POSITION TO QUESTION OBLIGATION IMPOSED BY LAND GRANT.

Though a mortgage on the property of a railroad was executed before the company applied for a grant of lands in aid of its construction, and did not purport specifically to cover public lands, one claiming under the mortgage was in no better position than the railroad company to question the obligation of the railroad to carry the mails at the price fixed by Congress, where the trustee under the mortgage claimed the lands as after-acquired property, and the company's interest therein was by special proceeding made subject to the foreclosure proceedings.

9. PUBLIC LANDS ⇨85 — REQUIREMENT OF LAND GRANT AS TO TIME OF CONSTRUCTION WAS CONDITION SUBSEQUENT AND RELINQUISHMENT OF REVERSIONARY INTEREST REMOVED RIGHT TO OBJECT.

The requirement of Act June 3, 1856, granting land to the state of Michigan to aid in the construction of railroads, that the railroads should be completed within 10 years was a condition subsequently annexed to an estate in fee, and the title remained valid until the federal government took action by legislative or judicial proceedings to enforce a forfeiture; and a relinquishment by Congress of its reversionary interest in the land removed all possibility of objection to the validity of the state's patent because of the failure to complete the line within the prescribed time.

10. POST OFFICE ⇨21(4)—RAILROAD CHARGED WITH OBLIGATION AS TO CARRYING MAILS THROUGH STATE PATENT TO LAND WAS INVALID.

Where Congress granted land to the state of Michigan to aid in construction of certain lines of railroad, and the state granted about 36,000 acres to a particular railroad, but the patent was held invalid as to about 30,000 acres, the railroad was nevertheless subject to the obligation imposed by the grant of carrying the mails at such price as Congress might direct.

Appeal from the Court of Claims.

Claim by the Grand Trunk Western Railway Company against the United States. The petition was dismissed (53 Ct. Cl. 473), and the claimant appeals. Affirmed.

Messrs. Thomas D. Halpin, of Lapeer, Mich., Harrison Geer, of Detroit, Mich., and L. T. Michener, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Spellacy, for the United States.

\*116

\*Mr. Justice BRANDEIS delivered the opinion of the Court.

The railroad from Port Huron to Flint, in Michigan, sixty miles in length, was completed on December 12, 1871. It was built by the Port Huron & Lake Michigan Railroad Company. By foreclosure of a mortgage exe-

\*117

cuted \*by that corporation and several consolidations it became on October 31, 1900, the property of the Grand Trunk Western Railway Company and has since been a part of its system. For forty-one years after the completion of this sixty-mile road the mails were carried over it by the successive owners under the usual postal contracts and payment was made for the service quarterly at full rates. In 1912 the Postmaster General, concluding that this was a land-aided railroad within the provisions of section 13 of the Act of July 12, 1876, c. 179, 19 Stat. 78, 82 (Comp. St. § 7485),<sup>1</sup> restated the account for the twelve full years during which the road had been operated by the Grand Trunk Western. Twenty per cent. of the mail pay for that period was found to be \$50,359.70; and this amount he deducted from sums accruing to the company under the current mail contract. He also reduced by twenty per cent. the amount otherwise payable under the current contract for carrying the mail over this part of its system. Thus he deducted altogether \$52,566.87 from the amount payable on June 30, 1913. The road had in fact been built without any aid through grant of public lands. None had passed to the Grand Trunk Western when it acquired the road; and, so far as appears, that company had no actual knowledge that any of its predecessors in title had acquired any public land because of its construction. The company insisted that the \$52,566.87 thus deducted from its mail pay was withheld without warrant in law, and brought this suit in the Court of Claims to recover the amount. 53 Ct. Cl. 473. Its petition was dismissed and

<sup>1</sup> "Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."



the case comes here on appeal. Whether the company is entitled to relief depends upon the legal effect of the following facts.

\*118

\*By Act of June 3, 1856, c. 44, 11 Stat. 21, Congress granted to Michigan public land to aid in the construction of certain lines of railroad a part extending easterly of Flint to Port Huron—another part, westerly of Flint to Grand Haven. The act contained in Section 5 the usual mail provision.<sup>2</sup> In 1857 the Legislature of Michigan granted these lands to two companies on condition that they accept the obligations of the grant within sixty days. Each company filed within the specified time a partial acceptance, refusing to accede to the taxation features of the grant. Thereupon the rights of each to any part of the public lands was declared forfeited by the state authorities for failure to comply with the state legislation. Subsequently the companies filed maps of definite location in the General Land Office of the Interior Department, which were approved by that office; and on June 3, 1863, the Secretary of the Interior certified to the Governor of Michigan 30,998.76 acres of land lying west of Flint for the company which was to build the line from Grand Haven to Flint, the Detroit and Milwaukee Railway Company. On November 1, 1864, he certified 6,428.68 acres, all but  $97^{40}/_{100}$  acres of which lay east of Flint, for the company which was to build the line from Flint to Port Huron, the Port Huron & Milwaukee Railway Company. Neither company constructed its line nor received any patent for land. The rights of way and other property of the Port Huron & Milwaukee Railway Company passed through a foreclosure sale to the Port Huron & Lake Michigan Railroad Company; and this corporation built the road in question

\*119

during the years 1869, 1870 and 1871. \*But it made no application for any part of these lands until three weeks before the completion of the road. Then, on November 18, 1871, it petitioned the State Board of Control, which was charged with the disposition of the public lands, to confer upon it both the 30,998.76 acres west of Flint and the 6,428.68 acres east of Flint which the Secretary of the Interior had certified; and in so applying it asked for the land "for the purpose of aiding in the construction" of its contemplated railroad which was described as extending from Grand Haven to Flint and thence to Port Huron. The board approved of making the grant "for the purpose of aiding in the construction of the road"; but no further action was taken until May 1, 1873, when upon a new petition of the company

which recited the former proceedings and the completion of "sixty miles of the unfinished portion of said line" the board directed the transfer of all the land to it. The resolution of the board was followed on May 30, 1873, by a patent for all the land from the Governor of the state, its formal acceptance by the company subject to the provisions of the Act of Congress of June 3, 1856, and action by it to take possession of the land and to dispose of it for the benefit of the company. In 1877 the Supreme Court of Michigan held in *Bowes v. Haywood*, 35 Mich. 241, that the patent so far as it purported to transfer the 30,988.76 acres west of Flint was void under the Michigan legislation, because there had not, in fact, been any claim or pretense that the company ever contemplated building the line west of Flint; and in *Fenn v. Kinsey*, 45 Mich. 446, 8 N. W. 64 (1881), that court held that an act of the Michigan Legislature passed May 14, 1877 (Laws 1877, No. 132), which purported to ratify the patent, was inoperative so far as it concerned the lands west of Flint because it impaired rights reserved to the United States by the Act of June 3, 1856. Meanwhile, Congress had relinquished to Michigan, by joint resolution of March 3, 1879, No. 15, 20 Stat. 490, its reversionary

\*120

\*interest in the lands;<sup>3</sup> and thereafter the Legislature of Michigan (Act of June 9, 1881, Laws Mich. 1881, p. 362), ratified as to the six thousand acres east of Flint, the action theretofore taken by the state authorities, declaring also that "all deeds and conveyances heretofore executed by the Port Huron & Lake Michigan Railroad Company" "shall be deemed to be of full force and effect" and that "the rest and residue of said lands is vested in said company, its successors or assigns." Whether there remained then any land which had not been disposed of by that company or one of its successors does not appear; but it does not appear that when in 1875 proceedings were taken to foreclose the mortgage under which the appellant claims title to the road, the trustee to whom the lands had been transferred for the company's benefit was joined for the purpose of including all such interest in the property to be sold.

The Act of June 3, 1856, had contemplated a grant of six sections (3,840 acres) per mile of road to be constructed. That would have been 230,400 acres for the sixty miles. The

<sup>2</sup> "Sec. 5. And be it further enacted, that the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: Provided, that until such price is fixed by law, the Postmaster General shall have the power to determine the same."

<sup>3</sup> Resolution of March 3, 1879, "That the United States hereby releases to the state of Michigan any and all reversionary interest which may remain in the United States in such of the lands granted to, and acquired by the said state of Michigan by act of Congress of June third, eighteen hundred and fifty-six, and certified to the said state in accordance with said act, as were granted to aid the construction of the road from Grand Haven to Flint, and then to Port Huron. This release shall not in any manner affect any legal or equitable rights in said lands, which have been acquired, but all such rights shall be and remain unimpaired."

company which built them and those claiming under it received at most 6,428 acres. The case is one of apparent hardship. Was the judgment of the Court of Claims denying relief required by the applicable rules of law?

[1-4] First. If the railroad was land-aided, payment of more than eighty per cent. of the full rates otherwise provided by law was unauthorized; and it was the duty of the Postmaster General to seek to recover the over-

\*121

payment. Revised \*Statutes, § 4057 (Comp. St. § 7606). He was under no obligation to establish the illegality by suit. Having satisfied himself of the fact he was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company to which the overpayment had been made. *Wisconsin Central Railroad Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399. There was no attempt to include in the deduction any alleged overpayment to any of appellant's predecessors in title. Balances due for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the accounting officers may be recovered by means of a later debit in these accounts. It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred. The statute of limitations does not ordinarily run against the United States and would not present a bar to a suit for the amount. See *United States v. Thompson*, 93 U. S. 486, 25 L. Ed. 194. It is true that when a department charged with the execution of a statute gives it a construction and acts upon that construction uniformly for a series of years, the court will look with disfavor upon a change whereby parties who have contracted with the government upon the faith of that construction would be injured. *United States v. Alabama Great Southern Railroad Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134. But here the practice long continued of paying the full rate instead of eighty per cent. thereof was not due to any construction of a statute which the department later sought to abandon, but to what is alleged to be a mistake of fact—due perhaps to an oversight. To such a case the rule of long-continued construction has no application. The appellant must be held to have taken the road with notice of the burdens legally imposed upon it.

[5] Second. If the road was land-aided, it is immaterial that the company which later

\*122

carried the mail over it received \*none of the land and obtained no benefit from the grant. The obligation to carry mails at eighty per cent. of rates otherwise payable attached to the road like an easement or charge; and it affects every carrier who may thereafter use

the railroad, whatever the nature of the tenure. *Chicago, Saint Paul, etc., Railway v. United States*, 217 U. S. 180, 30 Sup. Ct. 470, 54 L. Ed. 721. The appellant expressly disclaims any contention that the mail clause should not apply because the quantity of land covered by the grant was small as compared with that contemplated by the Act of June 3, 1856, and with the cost of the road.

[6-8] Third. It is contended that this railroad was not land-aided, because it had, in fact, been completed without the aid either of funds or of credit derived from these public lands. Whether the Port Huron & Lake Michigan Company which built the railroad was in fact aided by the land grant in so doing is immaterial. Before the road had been fully completed it asked that the land be granted to it in aid of the construction, and for this purpose only could the grant be made under the act of Congress. It accepted from the state a patent for the land which recited that such was the purpose of the conveyance; and it expressly assented to the terms and conditions of the grant imposed by the Act of June 3, 1856. Thereafter it proceeded to dispose of the land. Throughout this period the Port Huron & Lake Michigan Company remained the owner of the railroad. It had been authorized by its charter to receive the land grant and necessarily to assent to the conditions upon which alone the grant could be made to it. It is true that the mortgage upon its property, under which appellant claims title, was executed before the company had applied for the grant; and it does not appear that the mortgage purported specifically to cover public lands; but the trustee under the mortgage claimed these lands as after-acquired property and the company's interest in them was, by special proceeding,

\*123

made subject \*to the foreclosure proceedings. The appellant is therefore in no better position than the Port Huron & Lake Michigan Company to question the charge upon the railroad imposed by acceptance of the grant.

[9] Fourth. Appellant points to the fact that the patent to the lands lying west of Flint was later held to be void by the Supreme Court of the State, and insists that thereby the charge or condition concerning the carriage of the mail must be held to have been relinquished. But the patent to the lands east of Flint never was declared void; the company's title to them never was questioned; and the objection to the patent to the western lands did not apply to them. That objection was that the Port Huron & Lake Michigan Railway Company was not a "competent party" to receive the western lands within the meaning of the eleventh section of the Michigan Act of 1857 (Laws 1857, No. 126), because it did not propose to construct a line from Grand Haven to Owosso. *Bowes v. Haywood*, *supra*, 246. And the attempt by the Legislature



to make it a "competent party" through the Act of 1877 violated the obligations of the federal government's grant. *Fenn v. Kinsey*, supra. The only flaw in the title to the lands east of Flint lay in the fact that the railway had not been completed within ten years of the Act of June 3, 1856, as required by that act. This requirement, however, was a condition subsequently annexed to an estate in fee, and the title remained valid until the federal government should take action by legislation or judicial proceedings to enforce a forfeiture of the estate. *Schulenberg v. Harriman*, 21 Wall. 44, 63, 64, 22 L. Ed. 551; *Railroad Land Co. v. Courtright*, 21 Wall. 310, 316, 22 L. Ed. 582. So far from doing so Congress relinquished by joint resolution its reversionary interest in the land, and thereby removed all possibility of objection on its part to the validity of the patent; and the state of Michigan later ratified the patent by legislation admitted to be valid.

[10] Fifth. The appellant urges that the il-

\*124

legality of the patent to the western lands constituted a failure of consideration which voided the contract with the government. The burden of the mail clause, it says, could be imposed only by contract between the government and Port Huron & Lake Michigan Company. The contract was for land west as well as east of Flint—and the land west could legally be granted only if the company contemplated building the road westward to Grand Haven. As there was not even a pretense that it contemplated such construction, the contract was illegal. The government's claim under the mail clause must fail, because no rights can be acquired under an illegal contract. So the appellant contends. Such a view is the result of regarding the transaction as a promise by the railway to the government to carry the mail at a price fixed by Congress, on consideration of 36,000 acres of public land. A contract of this sort would create a purely personal obligation attaching "to the company, and not to the property"—clearly not to a mere licensee. However, it is settled that the obligation in question is not of this nature but does attach to the property, even when used by a licensee. *Chicago, St. Paul, etc., Ry. v. United States*, 217 U. S. 180, 30 Sup. Ct. 470, 54 L. Ed. 721. The obligation of a land-aided railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The Legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the Act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the act is as follows:

"Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads, \*under the direction of the Post Office Department, at such price as Congress may by law direct. \* \* \*

\*125

The order of the Board of Control of May 1, 1873, directing the transfer of the land to the Port Huron & Lake Michigan Company, and the patent issued by the Governor were founded upon the authority of section eleven of this act; and under date of May 30, 1873, the company accepted the lands with the burdens they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burdens if it had foreseen the invalidity of the title to the western lands, is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever no matter how disproportionate to the cost of constructing the portion so aided.

The transaction called illegal was one between the company and the state authorities. The United States was no party to it. It had merely supplied property which the parties to it used. The government never objected to the disposition made of it; and evidenced its approval by passage of the joint resolution of March 3, 1879. No reason exists why rights by way of charge upon the railroad which were acquired by the government through the acceptance of six thousand acres of public land, should be invalidated by the alleged illegality of the state authorities' action in issuing a patent to a wholly different tract.

Affirmed.

(252 U. S. 273)

# STATE OF MINNESOTA v. STATE OF WISCONSIN.

(Argued Oct. 16 and 17, 1919. Decided March 8, 1920.)

No. 16, Original.

## 1. STATES 12(2)—LOCATION OF MOUTH OF ST. LOUIS RIVER, FIXING BOUNDARY OF WISCONSIN STATED.

Within the meaning of Act Cong. Aug. 6, 1846, describing the northern boundary of Wisconsin as running through the center of Lake Superior to the mouth of the St. Louis river, the mouth of such river is not southeast of Big Island, where the banks, channel, and current characteristic of a river end and lake features begin, but at the deep channel between Minnesota Point and Wisconsin Point.

2. STATES  12(2)—BOUNDARY LINE MUST BE LOCATED BY REFERENCE TO SITUATION AT TIME ACT DEFINING BOUNDARIES WAS PASSED.

The location of the main channel of the St. Louis river, designated as the northern boundary of Wisconsin by Act Aug. 6, 1846, must be determined upon consideration of the situation existing in 1846.

3. STATES  12(2)—LOCATION OF MAIN CHANNEL OF ST. LOUIS RIVER, CONSTITUTING BOUNDARY LINE, STATED.

In Upper St. Louis Bay, the main channel of the St. Louis river, constituting the boundary between Wisconsin and Minnesota by Act Aug. 6, 1846, is not the narrow winding channel near the Minnesota shore, with a ruling depth of 10 or possibly 8 feet, but the shorter and more direct course westward to the deeper channel, about seven-eighths of a mile northeast of Big Island.

4. STATES  12(2)—MAIN CHANNEL OF RIVER CONSTITUTING BOUNDARY IS LOCATED BY REFERENCE TO ACTUAL OR PROBABLE USE; "THALWEG."

The doctrine of "thalweg," under which the boundary line between states separated by a navigable river is the middle of the main channel of the stream, has reference to actual or probable use of the stream, and does not necessarily refer to the line of the greatest depth, if it is not the channel generally used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Thalweg.]

In Equity.

Original suit by the State of Minnesota against the State of Wisconsin. Decree entered, fixing the boundary line as stated in the opinion.

\*275

\*Messrs. W. D. Bailey and H. B. Fryberger, both of Duluth, Minn., Lyndon A. Smith, of St. Paul, Minn., Charles R. Pierce, of Washington, D. C., and Clifford L. Hilton and Frank B. Kellogg, both of St. Paul, Minn., for complainant.

Messrs. M. B. Olbrich, of Madison, Wis., Walter C. Owen, of Maiden Rock, Wis., and Walter Drew, of Milwaukee, Wis., for defendant.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

We are asked to ascertain and establish the boundary line between the parties in Upper and Lower St. Louis Bays. Complainant claims to the middle of each bay—half-way between the shores. The defendant does not seriously question this claim as to the lower bay, but earnestly maintains that in the upper one the line follows a sinuous course near complainant's shore. Since 1893 a deep channel has been dredged through these waters and harbor lines have been established. According to Wisconsin's insistence, its border crosses and recrosses this channel and intersects certain docks extending from

the Minnesota shore, leaving portions of them in each state. See *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 663; *Norton v. White-side*, 239 U. S. 144, 36 Sup. Ct. 97, 60 L. Ed. 186.

"An act to enable the people of Wisconsin Territory to form a Constitution and state government, and for the admission of such state into the Union," approved August 6, 1846 (9 Stat. 56, c. 89), described the boundary in part as follows:

"Thence [with the northwesterly boundary of Michigan] down the main channel of the Montreal river to the middle of Lake Superior; thence [westwardly] through the center of Lake Superior to the mouth of the St. Louis river;

\*276

thence up the main channel \*of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the River St. Croix," etc.

With the boundaries described by the Enabling Act, Wisconsin entered the Union May 29, 1848 (9 Stat. 233, c. 50).

"An act to authorize the people of the territory of Minnesota to form a Constitution and state government, preparatory to their admission in the Union," approved February 26, 1857 (11 Stat. 166, c. 60), specifies a portion of the boundary thus:

"Thence by a due south line to the north line of the state of Iowa; thence east along the northern boundary of said state to the main channel of the Mississippi river; thence up the main channel of said river, and following the boundary line of the state of Wisconsin, until the same intersects the St. Louis river; thence down said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possessions."

With boundaries as therein described, Minnesota became a state May 11, 1858 (11 Stat. 285, c. 31).

The present controversy arises from conflicting interpretations of the words:

"Thence [westwardly] through the center of Lake Superior to the mouth of the St. Louis river; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map."

The situation disclosed by an accurate survey gives much room for differences concerning the location of the "mouth of the St. Louis river" and "the main channel of said river." Nicollet's map of the "Hydrographical Basin of the Upper Mississippi River," published in 1843, and drawn upon a scale of 1:1,200,000—approximately 20 miles to the inch—is too small either to reveal or to give material aid in solving the difficulties. A sketch from it—approximately on original scale—is printed on the next page.





•284

•SHORE LINE, SKETCHED FROM MEADE'S CHART.

Scale: About two-thirds of an inch to 1 mile.





\*285

\*FROM A PHOTOGRAPH—PORTION OF ORIGINAL MEADE MAP WEST OF  
GRASSY POINT, ON FILE IN OFFICE U. S. ENGINEERS.

Scale: About 1 mile to 3 inches.

(The words "Fishermans Island" have been added.)



\*278

\*in length, from the deep channel south of Grassy Point and east of Fisherman's Island to the deep water immediately westward of

\*279

the \*bar, about seven-eighths of a mile north-east of Big Island. It further discloses a curving channel along the west side of Grassy Point, and thence close to the Minnesota shore and around Big Island, with a depth of 15 or more feet, except at the bar, where there are only 10, possibly 8, feet. To the south of Big Island lies the well-known and formerly much-used course indicated on Lieut. Bayfield's Map.

The level of the water within all the bays is substantially the same as in Lake Superior; such current as exists flows in opposite directions, according to the wind and movement within the lake. The shores are irregular and much indented.

Since 1893 the United States have dredged a 22 foot channel through Upper St. Louis Bay and around Grassy Point; thence through Lower St. Louis Bay (where there are two branches) and between Rice's and Connor's Points; thence through Superior Bay to "The Entry" and into the lake. Extensive docks have been constructed from the Minnesota shore in both the upper and lower bays; those extending southwest from Grassy Point cross the boundary claimed by Wisconsin. The general situation of 1846 continued until long after 1861, but during the last 30 years extensive improvements required for a large and busy harbor have produced great changes.

[1] The complainant maintains that within the true intentment of the statute the "mouth of the St. Louis river" is southeast of Big Island, where end the banks, channel, and current characteristic of a river and lake features begin. On the other hand, the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin Points—"The Entry."

It is unnecessary to specify the many facts and circumstances, historical and otherwise, which lead to the conclusion stated. They

\*280

seem adequate, notwithstanding \*some troublesome objections based upon the peculiar hydrographic conditions.

[2] Treating "The Entry" as the mouth of the St. Louis river, where is the line "thence up the main channel of said river to the first rapids," etc.? This must be determined upon consideration of the situation existing in 1846, which the parties admit remained substantially unchanged until after the Meade survey. No alterations now material have come about through accretion or erosion.

The line through Superior Bay is not here called in question. But let it be noted that no vessel drawing more than 8 feet could have passed into that bay from Lake Super-

rior, that within "The Entry" there were only small boats of light draft, and that navigation long remained rather primitive.

[3] Lower St. Louis Bay was shallow, with a ruling depth of 8 feet, and had no well-defined channel. From the deep water at the southern tip of Grassy Point a vessel drawing less than 8 feet bound north of Big Island and beyond could have turned northwest and followed the narrow winding channel near the Minnesota shore with a ruling depth of 10, possibly 8, feet, or it could have proceeded westward, approximately one mile, over a more direct course with a depth of 8 feet or more, until it came to the deeper channel about seven-eighths of a mile north-east of Big Island. This latter course is indicated by the red trace "A, B, C," on Minnesota's Exhibit No. 1—Meade's Chart. For many years officers and representatives of both states regarded the boundary as on or near this line; and, considering all the circumstances, we think it must be accepted as the main channel within intentment of the statute. No current controlled navigation, and vessels proceeding in opposite directions followed the same general course.

Both parties say that in 1846—

"practically all of Upper and Lower St. Louis

\*281

Bays between the shores were navi\*gable for such vessels as were accustomed to use said bays at said time for the purpose of navigation, and there was no defined course, or channel, in said bays, which said vessels followed, but, owing to the depth of the water, they were permitted and accustomed to travel across said bays in any direction."

For very many years subsequent to 1846 there were no vessels with 8-foot draft upon these waters, and probably none of such size regularly plied there until 1890 or later.

The course south of Big Island shown on the Bayfield Map was never accepted as the boundary, and need not be further considered. Wisconsin's claim to that island is not denied.

Manifestly, from the description heretofore given, the waters between Big Island and Lake Superior were broad sheets, without any definite uninterrupted deep channel extending throughout their entire length; also there was no steady, controlling current. Such vessels as plied there in 1846 and long thereafter moved with freedom in different directions. The evidence convinces us that, as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis Bay commonly followed by vessels going to or coming from points above Big Island was not along the narrow curving channel skirting Grassy Point, but over the shorter one near the middle of the bay.

This court approved the doctrine of Thalgeweg, as opposed to the physical middle line, in *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55, and has adhered thereto. *Louisiana v. Mississippi*, 202 U. S. 1, 26 Sup.



Ct. 408, 571, 50 L. Ed. 913; Washington v. Oregon, 211 U. S. 127, 29 Sup. Ct. 47, 53 L. Ed. 118; Id., 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969; Arkansas v. Tennessee, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258.

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of

\*282

the river admits \*of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. \* \* \* Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed." Iowa v. Illinois, supra, 147 U. S. 7, 13, 13 Sup. Ct. 241, 243, 37 L. Ed. 55.

"As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states." Louisiana v. Mississippi, supra, 202 U. S. 50, 26 Sup. Ct. 421, 50 L. Ed. 913.

[4] The doctrine of Thalweg, a modification of the more ancient principle, which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel, close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

As we view the whole record, the claim of Wisconsin cannot prevail, unless the doctrine of Thalweg requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in the waters below Upper Bay was 8 feet, and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circum-

\*283

stances \*Minnesota would be deprived of equality of right both in navigation and to the surface, if the boundary line were drawn near its shore.

A decree will be entered, declaring and adjudging as follows: That the boundary line between the two states must be ascer-

tained upon a consideration of the situation existing in 1846 and accurately disclosed by the Meade Chart. That when traced on this chart the boundary runs midway between Rice's Point and Connor's Point, and through the middle of Lower St. Louis Bay to and with the deep channel leading into Upper St. Louis Bay, and to a point therein immediately south of the southern extremity of Grassy Point; thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's Island and as indicated by the red trace "A, B, C," on Minnesota's Exhibit No. 1, approximately one mile, to the deep channel and immediately west of the bar therein; thence with such channel north and west of Big Island up stream to the falls.

Within 30 days counsel may present a proper decree for carrying this opinion into effect. The costs will be equally divided between the states.

It seems appropriate to repeat the suggestion, made in Washington v. Oregon, supra, 214 U. S. 217, 218, 29 Sup. Ct. 631, 53 L. Ed. 969, that the parties endeavor with consent of Congress to adjust their boundaries.

Mr. Justice BRANDEIS concurs in the result.

(252 U. S. 308)

## PANAMA R. CO. v. TOPPIN.

(Argued and Submitted Jan. 16, 1920. Decided March 15, 1920.)

No. 147.

### 1. MASTER AND SERVANT ⇐307—CRIMINAL ACT CAUSING INJURIES ACTIONABLE.

Under the law of the republic of Panama (Ordinance No. 87 of 1896, arts. 488 and 489, Law No. 62 of 1887, art. 5, and Civ. Code, art. 2341), a railroad company is not relieved from liability in damages for injuries resulting from the negligence of an employé merely because the negligent act is also punishable as a crime.

### 2. ACTION ⇐62—RULE UNDER COLOMBIAN JUDICIAL CODE AS TO POSTPONING CIVIL ACTION UNTIL CONCLUSION OF CRIMINAL ACTION NOT APPLICABLE.

The rule of practice under the Judicial Code of Colombia that a civil action cannot be prosecuted until the conclusion of a criminal action, arising out of the same act, has no application to an action against a railroad company for injuries sustained in Panama from the negligence of the engineer, though the engineer would be punishable criminally, as the same person is not liable both civilly and criminally.

### 3. MASTER AND SERVANT ⇐304—MASTER EXERCISING CARE IN SELECTING SERVANT NOT RELIEVED FROM LIABILITY FOR HIS NEGLIGENCE.

Under the law of the republic of Panama (Col. Civ. Code, § 2347, and Law 62 of 1887,

art. 5), a railroad company is not relieved of liability for an injury caused by the negligence of its engineer because it exercised care in selecting him.

#### 4. DAMAGES 32--DAMAGES FOR PHYSICAL PAIN RECOVERABLE IN ACTION FOR PERSONAL INJURIES.

In an action against a railroad company for personal injuries sustained in the republic of Panama, damages for physical pain were recoverable whether the law of Panama or that of the Canal Zone, where the action was brought, was applicable.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Joseph T. Toppin against the Panama Railroad Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals for the Fifth Circuit (250 Fed. 989), and defendant brings error. Affirmed.

\*309

\*Messrs. Frank Feuille and Walter F. Van Dame, both of Ancon, C. Z., for plaintiff in error.

Messrs. Wm. C. MacIntyre, of Cristobal, C. Z., and Felix E. Porter, of Ancon, C. Z., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Toppin was struck by a locomotive of the Panama Railroad Company while riding a horse in the city of Colon. He sued the company for damages in the District Court of the Canal Zone, alleging negligence, and recovered a verdict. The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Fifth Circuit (250 Fed. 989, 163 C. O. A. 239), and the case is here on writ of error.

The main contentions of the company are here, as in *Panama Railroad Co. v. Bosse*, 249 U. S. 41, 39 Sup. Ct. 211, 63 L. Ed. 466, that the trial court erred in holding applicable the rule of respondeat superior and the rule permitting recovery for physical pain suffered. The important difference in the two cases is this: There the accident occurred in the Canal Zone; here in the republic of Panama. The company insists that the *Bosse* Case is not controlling, because the questions affecting liability must here be determined by the law of that republic, the place where the accident occurred. *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; *Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

\*310

The law of Panama is pleaded by both parties and evidence thereon was introduced by both; but we are not limited to this evidence, as they agree that we may take judicial notice of the law of Panama existing February 26, 1904, when the Canal Treaty was proclaimed, and that, in the absence of evidence to the contrary, the law then prevail-

ing there will be presumed to have continued in force.

[1, 2] First. The company contends that the jury should have been instructed that under the law of Panama the company was not liable if the accident resulted from a criminal act of its employes; there being evidence that it was due to running the locomotive at a rate of speed prohibited under penalty by the Police Code of Panama. That Code, known as Ordinance No. 87 of the year 1896, provides (articles 488, 489):

"When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subject by reason of the damage fault or tort. \* \* \*

"This article \* \* \* shall be applied to railroads when they enter cities or towns."

The Panama Law No. 62 of 1887 had provided in article 5:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads and which are imputable to want of care, neglect or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

And article 2341 of the Civil Code provides:

"He who shall have been guilty of an offense or fault, which has caused another damage, is

\*311

obliged to repair it, \*without prejudice to the principal penalty which the law imposes for the fault or offense committed."

It would seem clear from a reading of these provisions that the company would not be relieved from liability in damages for injuries resulting from the negligence of its employe, merely because the negligent act was also punishable as a crime. And the Colombian authorities to which our attention has been called tend to confirm this construction.<sup>1</sup> There seems to have been a rule of practice under the Colombian Judicial Code (article 1501)<sup>2</sup> by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among

<sup>1</sup> *Cecilia Jaramillo de Cancino v. The Railroad of the North*, Supreme Court of Justice of the Republic of Colombia, XIII Judicial Gazette, Nos. 652-653, decided December 16, 1897.

<sup>2</sup> *Ruperto Restrepo v. Sabana Railway Company*, Supreme Court of Justice of the Republic of Colombia, III Judicial Gazette, No. 353, pp. 332-334, decided July 19, 1892.



other reasons because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced.

[3] Second. The company contends that by the law of Panama it cannot be held liable for the injury caused by the negligence of its engineer if it was careful in selecting him, because the law of Panama does not recognize liability without fault. This contention was made and rejected by the Supreme Court of Colombia in a case similar to the case at bar.<sup>3</sup> There suit was brought against the empresario of a railway to recover for the loss of a house by fire due to the negligent

operation of a locomotive. \*The court rested the liability upon section 2347 of the Civil Code,<sup>4</sup> declaring that all doubt as to the existence of the necessary dependency was removed by article 5 of Law 62 of 1887, which "without in any way mentioning the dependents, employes, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the service of the said roads." The court continues: "And there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employes not being sufficient in the opinion of the court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen."<sup>5</sup> This case seems to overrule in effect the principal authority to which the plaintiff in error has referred us<sup>6</sup>—in fact, it

<sup>3</sup> Cancino v. The Railroad of the North, supra, note 1.

<sup>4</sup> Article 2347: "Every person is responsible not only for his own actions for the purpose of making good the damage, but for the act of those who may be under his care.

"Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.

"Thus the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.

"Thus the husband is responsible for the conduct of his wife.

"Thus the directors of colleges and schools respond for the acts of students while they are under their care, and artisans and empresarios for the acts of their apprentices and dependents in like cases.

"But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act."

<sup>5</sup> See, also, Panama Railway Co. v. Bosse, 249 U. S. 41, 49, 39 Sup. Ct. 211, 63 L. Ed. 466.

<sup>6</sup> Ramirez v. The Panama Railroad Company, Supreme Court of Justice of Colombia, 1 Gaceta Judicial, No. 22, p. 170 (June 10, 1887).

is not unlikely that such was the object of article 5 of Law 62 of 1887.

\*313

[4] \*Third. The contention that the lower courts erred in allowing recovery for physical pain was made and overruled in Panama Railroad Co. v. Bosse, supra, 249 U. S. 47, 39 Sup. Ct. 211, 63 L. Ed. 466. As the decision there rested upon article 2341 of the Civil Code of Panama, it is applicable whether the lex loci or the lex fori should be held controlling as to such damages. Exception was also taken to the ruling that "if the plaintiff has developed tuberculosis of the spine as a result of the injuries received" the tuberculosis may be considered as an element of damages. The instruction was given with such explanations as to have been clearly unobjectionable.

Affirmed.

(252 U. S. 286)

COLE et al. v. RALPH (two cases).

(Argued Dec. 8, 1919. Decided March 15, 1920.)

Nos. 172, 173.

1. CERTIORARI  $\S$ 69—SUPREME COURT MAY EITHER MAKE COMPLETE DECISION OR CONSIDER ONLY MATTERS DECIDED BY CIRCUIT COURT OF APPEALS AND REMAND FOR DETERMINATION OF OTHER QUESTIONS.

On certiorari to review judgments of the Circuit Court of Appeals, reversing judgments of the District Court and ordering a new trial, the Supreme Court may either proceed to a complete decision or deal only with the matter considered by the Circuit Court of Appeals, and remand the cases to that court for any needed action on other questions.

2. PLEADING  $\S$ 403(2)—OMISSION OF ALLEGATION FROM COMPLAINT CURED BY ALLEGATION IN ANSWER.

In suits to determine adverse claims under conflicting mining locations, the failure of the complaints to allege with certainty that defendant was in possession was cured by an affirmative statement in the answer that he was in possession.

3. PLEADING  $\S$ 406(7)—OBJECTIONS WAIVED BY FAILURE TO OBJECT UNTIL TRIAL.

Defendant waived want of precision in some of the allegations of the complaint by failing to make timely objection until the trial was in progress, as timely objections would doubtless have resulted in appropriate amendments.

4. MINES AND MINERALS  $\S$ 34—CONTRACT BY LOCATORS GIVING OTHER PERSONS INTEREST IN OUTPUT GOOD, THOUGH NOT RECORDED.

Under Rev. Laws Nev. 1912, §§ 1038-1040, a contract executed by locators of mining claims, giving other persons a right to a specified share in the output of the claim, was good between the parties, though not recorded.

5. MINES AND MINERALS ⚡38(4) — PERSON HAVING INTEREST IN OUTPUT OF MINE WAS ADMISSIBLE BUT NOT NECESSARY PARTY TO ADVERSE CLAIM AND SUIT FOR DETERMINATION.

A person having a right to a specified share in the output of a mining claim under a contract with the locators was not an essential party to an adverse claim filed in the land office, or to a suit to determine the adverse claims, but was an admissible party in view of Rev. Laws Nev. 1912, §§ 4998, 5000.

6. HUSBAND AND WIFE ⚡249, 265, 270(5)—MINES AND MINERALS ⚡38(4)—HUSBAND PROPER PARTY TO FILE ADVERSE CLAIM AND SUIT FOR DETERMINATION, WHERE PROPERTY WAS COMMUNITY PROPERTY.

Where a husband conveyed an interest in a mining claim to his wife, but the consideration was not paid out of her separate property, the conveyance was not intended as a gift, and she never listed the property as her separate property, it was community property of which the husband had the entire management and control and absolute power of disposition, under Rev. Laws Nev. 1912, §§ 2155-2160, and an adverse claim and suit for the determination of adverse claims was properly filed by him.

7. MINES AND MINERALS ⚡38(4)—PARTY SUCCEEDING TO INTEREST IN MINING CLAIM PENDING SUIT PROPERLY MADE PARTY.

Where, pending a suit to determine adverse claims under conflicting mining locations, the interest of one of the plaintiffs was transferred by attachment proceedings, the transferees were entitled to the benefit of what he had done while he held title, and were properly substituted as plaintiffs.

8. MINES AND MINERALS ⚡41—MISTAKE IN ADVERSE CLAIM AS TO NAME OF CLAIMANT IMMATERIAL WHERE NO ONE WAS MISLED.

That an adverse claim to a mining location filed in the land office stated the name of one of the claimants as "Frank" instead of "John" by inadvertence was immaterial, where no one was misled or prejudiced.

9. INTERNAL REVENUE ⚡34 — OMISSION OF REVENUE STAMPS DOES NOT RENDER DEEDS INADMISSIBLE AS EVIDENCE.

Under Act Oct. 22, 1914, c. 331, §§ 6, 11, 12, 13, 22, the omission of the required revenue stamps from deeds did not render the same inadmissible as evidence.

10. MINES AND MINERALS ⚡27(1)—RULE AS TO LOCATION OF LAND IN POSSESSION OF ANOTHER, WHO HAS NOT MADE DISCOVERY, STATED.

In advance of discovery, an explorer in actual occupation, and diligently searching for mineral, is treated as a licensee or tenant at will, and no right can be initiated or acquired from a forcible fraudulent or clandestine intrusion upon his possession, but if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably and not fraudulently or clandestinely, and makes a mineral discovery and location, the location is valid.

11. MINES AND MINERALS ⚡29(1) — RIGHTS ACQUIRED BY LOCATION BASED ON DISCOVERY STATED; "PROPERTY."

A mining location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and, so long as it is kept alive by performance of the required assessment work, prevents any adverse location.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

12. MINES AND MINERALS ⚡17(1) — NATURE OF LOCATION MUST CORRESPOND WITH NATURE OF DISCOVERY AS LODE OR PLACER.

Under Rev. St. §§ 2320, 2329 (Comp. St. §§ 4615, 4628), a placer discovery will not sustain a lode location, nor a lode discovery a placer location.

13. MINES AND MINERALS ⚡14(1)—NATURE OF "LOCATION" STATED.

"Location" is the act or series of acts whereby the boundaries of a claim are marked, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Location.]

14. MINES AND MINERALS ⚡17(1)—DISCOVERY ESSENTIAL AND NOT RENDERED UNNECESSARY BY LOCATION OR ASSESSMENT WORK.

Location confers no right in the absence of discovery, nor will assessment work take the place of discovery.

15. MINES AND MINERALS ⚡17(1)—LOCATION MAY PRECEDE DISCOVERY IF THERE ARE NO INTERVENING RIGHTS.

While in practice, discovery usually precedes location of a mining claim, it is no objection, in the absence of an intervening right, that the usual order is reversed, and in such case the location becomes effective from the date of discovery.

16. MINES AND MINERALS ⚡38(23)—IN SUIT TO DETERMINE CONFLICTING CLAIMS COURT HELD NOT TO HAVE PLACED BURDEN ON DEFENDANTS.

In a suit to determine adverse claims under defendant's lode location and a later placer location under which plaintiffs claimed, where the court denied a motion to strike out plaintiffs' evidence as to defendant's failure to discover lodes, on the ground that the burden was on plaintiffs to show that the ground in dispute was open to location, and defendant's requested instructions recited that plaintiffs had introduced evidence tending to show that the ground contained no lodes, veins, or mineral-bearing rock in place, and the court charged that the burden was on plaintiffs to show that when they went on the claims the ground was open to location, and there were no valid subsisting locations, there was no basis for defendant's objection that the burden was placed on them of proving lode discoveries.



17. MINES AND MINERALS ⇨38(22)—IN SUIT OVER CONFLICTING CLAIMS, DIRECTION OF VERDICT PROPERLY DENIED.

In suits to determine conflicting claims under defendant's lode location, and plaintiffs' later placer location, where there were disputable questions of fact as to the presence or absence of lode discoveries, defendant's possession when the locators of plaintiffs' claims entered and made their discoveries, etc., and defendant's acquiescence in the acts of the placer locators, the direction of verdicts for defendant was properly denied.

18. MINES AND MINERALS ⇨19(1)—PLACER LOCATORS DID NOT ADMIT VALIDITY OF PRIOR LODE LOCATION BY POSTING RELOCATION NOTICE BY MISTAKE.

Where parties making a placer discovery within the limits of an earlier lode location posted a notice that they had relocated the claim as a lode claim, but on the next day substituted another notice of location as a placer claim, and nothing was ever done or claimed under the first notice, and no one was misled by the mistake, the posting thereof was not an admission of the validity of the lode location.

19. MINES AND MINERALS ⇨38(17)—RECITAL OF DISCOVERY IN RECORDED NOTICE OF LOCATION NOT EVIDENCE OF DISCOVERY.

Under the general rule recognized and applied in Nevada, the recitals of discovery in recorded notices of location of lode claims are mere ex parte self-serving declarations, and not evidence of discovery.

20. APPEAL AND ERROR ⇨1058(1)—EXCLUSION OF EVIDENCE COULD NOT BE COMPLAINED OF WHERE COURT SUBSEQUENTLY CHANGED ITS RULING AND DEFENDANT TOOK NO OBJECTION.

Defendant could not complain of the court's refusal to permit him to show the contents of certain assay reports on cross-examination of a witness for plaintiffs, where the court subsequently recalled its ruling and announced another more favorable to defendant, the witness was then recalled, and some of the reports put in evidence, and defendant did not call for the others, or reserve any exception to the new ruling.

21. MINES AND MINERALS ⇨29(2)—STATUTE DOES NOT DISPENSE WITH DISCOVERY AS ESSENTIAL TO VALID LOCATION, THOUGH PERIOD OF LIMITATION HAS RUN.

Rev. St. § 2332 (Comp. St. § 4631), providing that when applicants for a patent for a mining claim have held and worked the claim for the local period of limitation for mining claims, evidence of such possession and working shall establish the right to the patent in the absence of adverse claim, does not dispense with the necessity of a discovery though the period of limitations has run.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Two suits by George A. Cole and others against Joseph Ralph. A judgment for plaintiffs in each suit was reversed by the Circuit Court of Appeals (249 Fed. 81, 161 C. C. A.

133), and plaintiffs bring certiorari. Judgments of the Circuit Court of Appeals reversed, and judgments of the District Court affirmed.

See, also, 248 U. S. 553, 39 Sup. Ct. 8, 63 L. Ed. 418.

\*288

\*Messrs. George B. Thacher and William C. Prentiss, of Washington, D. C., for petitioners.

Messrs. Samuel Herrick, of Washington, D. C., and P. G. Ellis, of Salt Lake City, Utah, for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These suits relate to conflicting mining locations in Nevada and are what are common-

\*289

ly called adverse suits. \*The locations set up on one side are lode and those on the other placer, the former being designated as Salt Lake No. 3, Midas, and Evening Star and the latter as Guy Davis and Homestake. Joseph Ralph is the lode claimant and the other parties are the placer claimants.

Ralph made application at the local land office for the issue to him of a patent for the three lode claims, along with thirteen others not here in question, and in due time two adverse claims were filed in that proceeding, one based upon the Guy Davis and covering most of the ground within the Salt Lake No. 3, and the other based upon the Homestake and covering a considerable portion of the ground within the Midas and Evening Star. These suits were brought in a state court in support of the adverse claims, and Ralph, the sole defendant, caused them to be removed into the federal court, the parties being citizens of different states. Afterwards some of the original plaintiffs were eliminated and others brought in, but the citizenship remained diverse as before.

The cases were tried together to the court and a jury, the latter returning general verdicts for the plaintiffs and special verdicts finding that when the placer locations were made no lode had been discovered within the limits of any of the lode locations. Judgments for the plaintiffs were entered upon the verdicts and motions by the defendant for a new trial were overruled. Upon writs of error the Circuit Court of Appeals reversed the judgments and ordered a new trial, one judge dissenting. Ralph v. Cole, 249 Fed. 81, 161 C. C. A. 133. The cases are here upon writs of certiorari which were granted because the ground upon which the Circuit Court of Appeals put its decision—the construction and application of some of the mineral land laws—was deemed of general interest in the regions where those laws are operative.

The defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals, \*but urges at length

\*290

that, if it be not well taken, the record discloses other grounds, not considered by that court, for reversing the judgments and ordering a new trial. And he further urges that, if the decision of the Circuit Court of Appeals be right, it is not sufficiently comprehensive to serve as a guide to the court and the parties upon another trial. The plaintiffs insist that the judgments in the District Court were right and should be affirmed.

[1] In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period.

[2, 3] Criticism is made of the complaints. As presented in the state court they fully met the requirements of the local Code, Rev. Laws 1912, § 5526, and there was no request after the removal into the federal court that they be recast to meet any further requirements prevailing there. Apart from the local Code, each sufficiently stated a cause of action in the nature of ejectment, save as some allegations were wanting in precision and it was left uncertain whether the defendant was in possession. The latter defect was cured by an affirmative statement in the answer that the defendant was in possession. *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408, 416, 31 Sup. Ct. 534, 55 L. Ed. 789. If the other defects embarrassed the defendant he should have interposed a timely objection, which doubtless would have resulted in appropriate amendments. Instead, he permitted the matter to pass until the trial was in progress and then sought to obtain some advantage from it. This he could not do; by his failure to make timely objection the defects had been waived. We here dispose of a related question by saying that, in our opin-

\*291

ion, the \*complaints, with the answers, put in issue the validity of the lode locations, including the requisite mineral discovery.

The defendant insists that necessary parties did not join in filing the adverse claims in the land office, that in the suits there was a misjoinder of plaintiffs and a failure to join essential plaintiffs, and that deeds showing title in some of the plaintiffs were erroneously admitted in evidence in that they were without the requisite revenue stamps. We think this insistence is untenable in all its phases.

As respects the *Guy Davis placer*, Davis and Faubert were the original locators and Faubert soon conveyed a fraction of his interest to Thatcher. These three filed the adverse claim and brought the suit, the title being in them at the time. Thereafter Faubert transferred his remaining interest to Cole,

Malley and Ross, and Thatcher conveyed a fraction of his interest to Healey. Because of these transfers, and with the court's approval, Faubert was eliminated as a party and Cole, Malley, Ross and Healey came in as plaintiffs. Thus the changes in title pending the suit were followed by corresponding changes in the parties plaintiff.

[4, 5] At all the times mentioned the title was in a sense affected by an outstanding contract, executed by the original locators, which invested Thatcher and Forman with a right to a specified share in the output or proceeds of the claim, and possibly with a right to have it worked and thereby made productive. The contract was not recorded, but this is not material, for the contract was good between the parties and no subsequent purchaser is calling it in question. See Rev. Laws 1912, §§ 1038-1040. Unlike Thatcher, Forman had no interest in the claim other than under this contract. He did not join in filing the adverse claim or in bringing the suit, but with the court's approval came in as a plaintiff before the trial. We think his in-

\*292

terest was not such as to make him an essential party to the adverse claim or to the suit, and yet was such as to make him an admissible party to either. Of course the acts of those having the title in filing the adverse claim and bringing the suit inured to his benefit. And had they proceeded in his absence to a judgment in their favor the same would have been true of it. But this does not prove that he could not be admitted as a plaintiff. He had an interest—a real interest—in the maintenance and protection of the claim which was the subject of the suit, and in view of the liberal provisions of the local statute, Rev. Laws 1912, §§ 4998, 5000, we think the court did not err in allowing him to come in as a plaintiff. It is not asserted that his presence was prejudicial to the defendant and we perceive no ground for thinking it could have been.

[6] As respects the *Homestake placer*, Murray Scott and John J. Healey were the original locators and the title was still in them when the adverse claim was filed and when the suit was begun, unless there be merit in the defendant's contention that Scott's interest had then passed to others under attachment proceedings and that Healey's interest had then passed to his wife. Neither branch of the contention is, in our opinion, well grounded. The attachment proceedings, although commenced before the adverse claim was filed, did not result in a transfer of Scott's title until after the present suit was begun. The purported conveyance of Healey's interest to his wife, to which the defendant directs attention, recites that it was made upon a consideration paid in money at the time, and this is in no wise explained. There is no evidence that the consideration was paid out of any separate prop-



erty of the wife, or that the conveyance was intended as a gift to her, or that she ever listed the subject of the conveyance as her separate property. In these circumstances, according to the laws of the state, the Healey interest was community property, of

\*293

which the husband had the "entire \*management and control" and the "absolute power of disposition." He could lease or convey it without the wife's concurrence and could sue in respect of it in his name alone. Rev. Laws 1912, §§ 2155-2160; *Crow v. Van Sickles*, 6 Nev. 146; *Lake v. Bender*, 18 Nev. 361, 384, 385, 4 Pac. 711, 7 Pac. 74; *Adams v. Baker*, 24 Nev. 375, 55 Pac. 362; *Malstrom v. People's Ditch Co.*, 32 Nev. 246, 260, 107 Pac. 98.

There was here a contract with Thatcher and Forman like that relating to the Guy Davis, and this gave them a real interest in the claim, as already explained.

[7] The adverse claim was filed and the suit was brought by Scott, Healey, Thatcher and Forman. Afterwards, and following the consummation of the attachment proceedings, the entire interest of Scott was transferred to Cole, Malley, Ross and Davis, and by reason of this, and with the court's approval, Scott was eliminated as a party and Cole, Malley, Ross and Davis came in as plaintiffs. Thus there was no misjoinder of plaintiffs, nor any failure to join an essential party. Of course, those who succeeded to Scott's interest pending the suit were entitled to the benefit of what he had done while he held the title.

[8] In one of the adverse claims Healey's name was given as Frank J. instead of John J., but this was a mere inadvertence, did not mislead or prejudice any one, and rightly was disregarded by the District Court.

[9] As to the absence of revenue stamps, it is true that the deeds showing title in some of the plaintiffs—they were produced in evidence over the defendant's objection—were without the stamps required by the Act of October 22, 1914, c. 321, § 22, Schedule A, 38 Stat. 762. But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid

\*294

and inadmissible as evidence while not \*properly stamped. Those words were carefully omitted, as will be seen by contrasting sections 6, 11, 12 and 13 of the Act of 1914 with sections 7, 13, 14 and 15 of the Act of 1898, c. 448, 30 Stat. 454. From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped and elected to rely upon other means of enforcing this

stamp provision, such as the imposition of money penalties, fines and imprisonment. The decisions upon which the defendant relies arose under the earlier acts and were based upon the presence in them of what studiously was omitted from the later one.

As a preliminary to considering other contentions it will be helpful to refer to some features of the mineral land laws, Rev. Stat. § 2318 et seq. (Comp. St. § 4613 et seq.), about which there can be no controversy, and also to what actually was in dispute at the trial and what not in dispute.

By those laws public lands containing valuable mineral deposits are opened to exploration, occupation and acquisition for mining purposes; and as an inducement to effective exploration the discoverer is given the right to locate a substantial area embracing his discovery, to hold the same and extract the mineral without payment of rent or royalty, so long as he puts one hundred dollars' worth of labor or improvements—called assessment work—upon the claim each year, and to demand and receive a patent at a small sum per acre after he has put five hundred dollars' worth of labor or improvements upon the claim.

[10] In advance of discovery an explorer in actual occupation and diligently searching for mineral<sup>1</sup> is treated as a licensee or tenant

\*295

at will, and no right can be initiated or \*acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Union Oil Co. v. Smith*, 249 U. S. 337, 346-348, 39 Sup. Ct. 308, 63 L. Ed. 635, and cases cited.

[11] A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land. *Gwillim v. Donnellan*, 115 U. S. 45, 49, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Swanson v. Sears*, 224 U. S. 180, 32 Sup. Ct. 455, 56 L. Ed. 721.

[12] While the two kinds of location—lode and placer—differ in some respects,<sup>2</sup> a dis-

<sup>1</sup> As to the status of an explorer or locator on oil-bearing land in advance of discovery, see the special provisions in Act June 25, 1910, c. 421, § 2, 36 Stat. 847 (Comp. St. § 4524), and Act March 2, 1911, c. 201, 36 Stat. 1015 (Comp. St. § 4637).

<sup>2</sup> *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 220, 229, 24 Sup. Ct. 632, 43 L. Ed. 944; *Webb v. American Asphaltum Co.*, 157 Fed. 208, 84 C. C. A. 651; *San Francisco Chemical Co. v. Duffield*, 201 Fed. 830, 120 C. C. A. 160; *Harry Lode Mining Claim*, 41 Land Dec. 403.

covery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral (section 2320 [Comp. St. § 4615]), and to sustain a placer location it must be of some other form of valuable mineral deposit (section 2329 [Comp. St. § 4628]), one such being scattered particles of gold found in the softer covering of the earth. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. As is said by Mr. Lindley,<sup>3</sup> § 323:

"Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the lands containing it must be appropriated according to the laws applicable to \*placers."

And again (section 419):

"It is the mode of occurrence, whether in place or not in place [meaning in rock in place], which determines the manner in which it should be located."

[13-15] Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. *Waskey v. Hammer*, 223 U. S. 85, 90, 91, 32 Sup. Ct. 187, 56 L. Ed. 359; *Beals v. Cone*, 27 Colo. 473, 484, 495, 62 Pac. 948, 83 Am. St. Rep. 92; *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 36 Nev. 543, 560, 138 Pac. 71; *New England Oil Co. v. Congdon*, 152 Cal. 211, 213, 92 Pac. 180. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." *Union Oil Co. v. Smith*, supra, 249 U. S. 350, 39 Sup. Ct. 311, 63 L. Ed. 635. In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337, 348-351, 25 Sup. Ct. 266, 49 L. Ed. 501, and cases cited; *Union Oil Co. v. Smith*, supra, 249 U. S. 347, 39 Sup. Ct. 308, 63 L. Ed. 635.

When an application for a patent to mineral land is presented at the local land office and an adverse claim is filed in response to the notice required by the statute (section 2325 [Comp. St. § 4622]) further proceedings upon the application must be suspended to await the determination by a court of competent jurisdiction of the question whether ei-

ther party, and, if so, which, has the exclusive right to the possession arising from a valid and subsisting location. A suit appropriate to the occasion must be brought by the adverse claimant, and in that suit each

\*297

party is deemed an \*actor and must show his own title, for the suit is "in aid of the land department." If neither establishes the requisite title the judgment must so declare. Rev. Stat. § 2326 (Comp. St. § 4623); Act March 3, 1881, c. 140, 21 Stat. 505 (Comp. St. § 4625); *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Perego v. Dodge*, 163 U. S. 160, 167, 16 Sup. Ct. 971, 41 L. Ed. 113; *Brown v. Gurney*, 201 U. S. 184, 190, 26 Sup. Ct. 509, 50 L. Ed. 717; *Healey v. Rupp*, 37 Colo. 25, 28, 86 Pac. 1015; *Tonopah Fraction Mining Co. v. Douglas* (C. C.) 123 Fed. 936, 941. If final judgment be given in favor of either party—whether the applicant for patent or the adverse claimant—he may file in the land office a certified copy of the judgment and then will be entitled, as respects the area awarded to him, to go forward with the patent proceedings and to have the judgment recognized and respected as a binding adjudication of his exclusive right to the possession. Rev. Stat. § 2336 (Comp. St. § 4644); *Richmond Mining Co. v. Rose*, 114 U. S. 576, 585, 5 Sup. Ct. 1055, 29 L. Ed. 273; *Wolverton v. Nichols*, 119 U. S. 485, 489, 7 Sup. Ct. 289, 30 L. Ed. 474; *Iron Silver Mining Co. v. Campbell*, 135 U. S. 286, 299, 10 Sup. Ct. 765, 34 L. Ed. 155; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 694, 15 Sup. Ct. 733, 39 L. Ed. 859; *Perego v. Dodge*, supra; *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 220, 232, 24 Sup. Ct. 632, 48 L. Ed. 944.

The situation developed by the evidence presented and admissions made in the course of the trial was as follows: At the outset the land was public and unappropriated, and it remained such save as the locations in question or some of them may have changed its status. The lode locations were made, one in 1897 and the other two in 1907, and the placer locations in September, 1913. The title under the latter already has been sufficiently traced. That under the lode locations passed to the Glasgow & Western Exploration Company soon after they were made, and the defendant, Ralph, claims under a deed executed by that company's liquidator in 1914. The principal controversy was over the presence or absence of essential discoveries within the lode locations, it being denied on one hand and affirmed on the other that a vein or lode of rock in

\*298

place bearing valuable mineral was discovered in each location before the placer locations were made. It was not controverted, but, on the contrary, conceded, that that point of time was the important one in the inquiry. Thus when the presiding judge in-

<sup>3</sup> Lindley on Mines, 3d Ed.



dictated his view by saying, "My idea is that you can't take advantage of any discoveries made since the placer locations, and I don't believe there can be any dispute about that," counsel for the defendant responded, "No, your honor, there is none," and on another occasion counsel said, "We are undoubtedly limited to proving that there was a discovery of mineral in place on each of our lode claims prior to the location of the placer claims." In all particulars other than discovery the regularity and perfection of the lode locations were conceded. Closely connected with the controversy over lode discoveries was another over the applicability and effect of section 2332 of the Revised Statutes (Comp. St. § 4631), but it will be passed for the moment and separately considered later. As to the placer claims, it was shown that they were based upon adequate discoveries of placer gold within their limits, and counsel for the defendant announced, "We don't deny this ground is of placer character." Their boundaries were properly marked, and the requisite notices were posted and certificates recorded. The only questions respecting their validity that were presented and need present mention were, first, whether at the time the placer locations were made the lode locations had become valid and effective claims, thereby precluding any adverse location of the same ground, and next, if the lode locations had not then become valid and effective, whether the placer locations were initiated and made through wrongful intrusions or trespasses upon any actual possession of the lode claimant. The defendant, as is admitted in his brief in this court, did not claim that any lode or vein was or should be excepted from the placer claims, but only that they were of no effect for the reasons just indicated.

#### \*299

\*The evidence bearing upon the presence or absence of lode discoveries<sup>4</sup> was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendant tended the other way. Separately considered, some portions of the

latter were persuasive, but it was not without noticeable infirmities, among them the following: The defendant testified that no ore was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my [his] knowledge which would stand the cost of mining, transportation and reduction at a commercial profit." In the circumstances this tended to discredit the asserted discoveries; and of like tendency was his unexplained statement, referring to the claims grouped in this patent application, that "some of them have not a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims"—an obviously mistaken view of the law—and his further statement, referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it."

As respects the initiation and working of

#### \*300

the placer \*claims, the plaintiffs' evidence indicated that the locators entered openly, made placer discoveries, performed the requisite acts of location, excavated several shafts in the "wash" from 35 to 57 feet in depth, ran drifts from the bottom along the bedrock, and mined a considerable amount of placer gold; and that these acts covered a period of between two and three months. None of this was contradicted; and there was no evidence that the locators met with any resistance or resorted to any hostile, fraudulent or deceptive acts. But there was evidence of such ownership of buildings, comparatively recent prospecting, and maintenance of a watchman, on the part of the lode claimant<sup>5</sup> as made it a fair question whether he was in actual possession when the placer locators entered. That he was in possession of the buildings and the ground where they stood was made certain, but that he had any actual possession beyond that was reasonably debatable under the evidence.

The buildings were all on the same claim and covered only a part of it. One was a mill formerly in use but then dismantled and stripped of its machinery. All had been used in connection with mining operations upon other claims, but the operations had then been suspended. The buildings were not disturbed by the placer locators, nor was there any attempt to appropriate them. A watchman was in charge, but so far as appears he made no objection to what was done. Although a witness for the defendant and in his employ, he was not interrogated upon this point. Of course, ownership of the buildings did not in itself give the lode claimant any right in the land or prevent others from entering peaceably and in good faith to avail themselves of privileges accorded by the mineral land laws; but the presence of the

<sup>4</sup> The following extracts from *Chrisman v. Miller*, 197 U. S. 313, 322, 25 Sup. Ct. 468, 470 (49 L. Ed. 770), show what constitutes an adequate discovery: "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

"The facts which are within the observation of the discoverer and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

<sup>5</sup> The lode claimant at that time was either the liquidator of the Glasgow & Western Exploration Company or the company itself.

\*301

buildings and his relation to them did have a bearing upon the question of actual possession—a pronounced bearing as respects the place where the building stood and a lesser bearing as respects the other ground.

Even if the lode claimant was in actual possession of all, it still was a disputable question under the evidence whether there had not been such acquiescence in the acts of the placer locators in going upon the ground, making placer discoveries and marking their locations as gave them the status of lawful discoverers and locators rather than wrongful intruders or trespassers, that is to say, the status of explorers entering by permission and then making discoveries. See *Crossman v. Pendery* (C. C.) 8 Fed. 693.

The questions of fact to which we have adverted were all submitted to the jury under a charge which was comprehensive, couched in plain terms, and in substantial accord with the legal principles hereinbefore stated. And, while the defendant criticizes some portions of the charge, we think they neither included nor omitted anything of which he rightfully can complain. As has been said, the jury returned general verdicts for the plaintiffs, and also special verdicts finding that no lode had been discovered within any of the lode locations before the placer ones were made.

[16] But it is objected that the court, instead of requiring the plaintiffs to take the burden of proving the absence of essential lode discoveries, subjected the defendant to the burden of proving that there were such discoveries. This is not in accord with the record. It there appears that the plaintiffs undertook at the outset to establish the absence of any lode discovery and persisted in that course, a large, if not the larger, part of their case in chief being directed to that point. When they rested the defendant moved that the evidence produced by them "as to the absence of lodes, or the failure or inability of the witnesses to find or discover

\*302

lodes or mineral-bearing rock in place" within the lode locations be stricken out because not within the issues tendered by the plaintiffs' complaints. The motion was denied and in that connection the court observed that the burden "undoubtedly" was on the plaintiffs not only to show their own placer discoveries, acts of location, etc., but also "that the ground in dispute was open to location;" and the court added, "Plaintiffs have, so far as the record discloses, always insisted that there was no lode discovery, and that the only discovery was of placer." There was also an admission in the defendant's requested instructions that the plaintiffs "in their case in chief" introduced evidence tending to show that "the ground comprised in the lode mining claims \* \* \* contained no lodes, veins or mineral-bearing rock in place and \* \* \* that said lode locations

were therefore invalid." And the court in charging the jury said:

"The burden is on the plaintiffs in the first instance to show that when they went on these claims to locate the placers the ground was open to location, and that there was at the time no valid, subsisting location where their discoveries were made."

It therefore is plain that the burden of proof was dealt with and carried in a manner which does not admit of criticism by the defendant.

[17] It is objected also that the court refused to direct verdicts for the defendant. But what has been said sufficiently shows that, in our opinion, the evidence presented several disputable questions of fact which it was the province of the jury to determine. This was the view not only of the judge who presided at the trial but of another judge who in overruling the motion for a new trial said:

"I think that not only is there substantial evidence to support the verdict, but the preponderance is upon that side."

Were we less satisfied than we are upon the point we should hesitate to disturb the concurring conclusions of those judges.

\*303

[18] \*It is urged that the court erred in not holding that the placer claimants had admitted the validity of one of the lode locations by relocating the ground as a lode claim. A short statement of what was done will show, as we think, that it did not involve any such admission. After the placer claimants made their placer discovery a representative of theirs posted on the ground a notice stating that they had relocated it as a lode claim. The next day he substituted another notice stating that they had located it as a placer claim. The first notice did not accord with their discovery and the other did. Nothing was done or claimed under the first and all the subsequent steps were in accord with the other. Evidently the first was posted by mistake and the other as the true notice. No one was misled by the mistake and it was promptly corrected. In these circumstances, the first notice was of no effect and no admission could be predicated of it. *Zeiger v. Dowdy*, 13 Ariz. 331, 114 Pac. 565.

[19] The further objection is made that no probative force was given to recitals of discovery in the recorded notices of location of the lode claims. The notices were admitted in evidence and no instruction was asked or given respecting the recitals. In one nothing is said about discovery, and what is said in the other two is meager. But, passing this, the objection is not tenable. The general rule is that such recitals are mere ex parte self-serving declarations on the part of the locators, and not evidence of discovery. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337, 352, 25 Sup. Ct.



266, 49 L. Ed. 501; Lindley on Mines (3d Ed.) § 392; Mutchmor v. McCarty, 149 Cal. 603, 607, 87 Pac. 85; Strepey v. Stark, 7 Colo. 614, 619, 5 Pac. 111; Magruder v. Oregon & California R. R. Co., 28 Land Dec. 174. This rule is recognized and applied in Nevada. Fox v. Myers, 29 Nev. 169, 186, 86 Pac. 793; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 36 Nev. 543, 560, 138 Pac. 71.

[20] Complaint is made because the defend-

\*304

ant was not permitted on the cross-examination of a witness for the plaintiffs to show the contents of certain assay reports. In his examination in chief the witness told of taking twelve samples from openings made by the lode claimant in the lode locations and of having the samples assayed. Seven of the assay reports were produced at the plaintiffs' request and put in evidence. They attributed to one sample a mineral value of sixty-three cents per ton and to the other six only a trace of mineral. In cross-examining the witness the defendant called for the remaining reports or their contents, but the plaintiffs objected and the objection was sustained. In other respects the cross-examination proceeded without restriction and included a full interrogation of the witness about the points from which each of the twelve samples was taken. This interrogation disclosed that one of the reports put in evidence covered a sample taken from an opening made after the location of the placer claims; and because of this that report was stricken out at the defendant's request and with the plaintiffs' consent. Near the close of the trial the court recalled its prior ruling and announced another more favorable to the defendant. The witness was then recalled and, after some further examination, three of the remaining reports were put in evidence. They attributed to one sample a mineral value of one dollar and thirty-four cents per ton and to the other two only a trace of mineral. Thus of the twelve reports all but two were produced. These two, like the one stricken out, covered samples taken from openings made after the placer claims were located. The defendant did not call for them when the witness was recalled or reserve any exception to the new ruling, and it is more than inferable from the record that he acquiesced in it. Of course, there is no merit in the present complaint.

[21] What we have said sufficiently disposes of all questions other than that before

\*305

mentioned respecting the applicability and effect of section 2332 of the Revised Statutes, which provides:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and work-

ing of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The defendant, conceiving that the section could be invoked in the absence of a mineral discovery, requested the court to instruct the jury that if the lode claimant held and worked the lode claims for a period of two years—the local prescriptive period for adverse possession, Rev. Laws 1912, § 4951—before the placer claims were initiated, such holding and working were the full equivalent of all that was essential to the validity of the lode claims, including discovery. That request was refused and others were then presented which differed from it only in that they treated discovery as essential by coupling it with holding and working. These were also refused, but no complaint is made of this—obviously because the jury were told that under the evidence the lode claims should be regarded as valid, if only the requisite discoveries were made at any time before the placer claims were initiated. The jury, as we have seen, found as matter of fact that there was no such discovery.

The effect which must be given to section 2332, Rev. St., in circumstances such as are here disclosed—whether it substitutes something else in the place of discovery or cures its absence—is the matter we have to consider. That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording and transfer, and thereby to relieve

\*306

against possible loss or \*destruction of the usual means of establishing such acts, is attested by repeated rulings in the land department and the courts. But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.

The view entertained and applied in the land department is shown in the following excerpt from a decision by the Secretary of the Interior:

"One purpose of section 2332, \* \* \* clearly shown in the history of the proceedings in Congress attending its consideration and passage there, was to lessen the burden of proving the location and transfers of old claims concerning which the possessory right was not controverted but the record title to which had in many instances been destroyed by fire or otherwise lost because of the insecurity and

difficulty necessarily attending its preservation during the early days of mining operations.

\* \* \*

"The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being in *pari materia* with the other sections of the Revision concerning such claims is to be construed together with them, and so as, if possible, that they may all stand together, forming a harmonious body of mining law." *Barklage v. Russell*, 29 Land. Dec. 401, 405, 406.

The views entertained by the courts in the mining regions are shown in *Harris v. Equa-*

\*307

tor Mining Co. (C. C.) 8 \*Fed. 863, 866, where the court ruled that holding and working a claim for a long period were the equivalent of necessary acts of location, but added that this, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence"; in *Humphreys v. Idaho Gold Mines Co.*, 21 Idaho, 126, 140, 120 Pac. 823, 40 L. R. A. (N. S.) 817, where the section was held to obviate the necessity for proving the posting, etc., of a location notice, but not to dispense with proof of discovery; in *Upton v. Santa Rita Mining Co.*, 14 N. M. 96, 89 Pac. 275, where the court held that the section should be construed in connection with other provisions of the mineral land laws, and that it did not relieve a claimant coming within its terms from continuing to do the assessment work required by another section; and in *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419, where the section was held not to change the class who may acquire mineral lands or to dispense with proof of citizenship.

As respects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim. Here, as the verdicts show, there was no discovery, so the working relied upon could not have been of the character contemplated by Congress.

The defendant places some reliance upon the decisions of this court in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, and *Reavis v. Fianza*, 215 U. S. 16, 30 Sup. Ct. 1, 54 L. Ed. 72, but neither contains any statement or suggestion that the section dispenses with a mineral discovery or cures its absence. The opinion in the first shows affirmatively that there was a discovery and that in the other shows

\*308

that the controversy, although of \*recent ori-

gin, related to "gold mines" which had been worked for many years.

The only real divergence of opinion respecting the section has been as to whether it is available in an adverse suit, such as these are, or is addressed merely to the land department. Some of the courts have held it available only in proceedings in the department (*McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602), and others in greater number have held it available in adverse suits (*Upton v. Santa Rita Mining Co.*, supra, and cases cited). The latter view has received the approval of this court. *Reavis v. Fianza*, supra; *Belk v. Meagher*, supra.

We conclude that the defendant was not entitled to any instruction whereby he could receive the benefit of section 2332 in the absence of a discovery, and therefore that the District Court rightly refused to give the one in question. The Circuit Court of Appeals held that the instruction should have been given, and in this we think it erred.

Judgments of Circuit Court of Appeals reversed.

Judgments of District Court affirmed.

(252 U. S. 341)

HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO.

(Argued January 30, 1920. Decided March 22, 1920.)

No. 208.

1. COURTS ⇐394(25)—OVERRULING OF OBJECTION TO ADMISSION OF PRIVATE ACT INVOLVED NO FEDERAL RIGHT, WHETHER ACT WAS VALID OR INVALID.

In a suit by a power company organized under a private act against another power company subsequently organized under the general law to quiet title, the private act was admissible in evidence, whether valid or invalid, as it was the foundation of the equity asserted in the bill, and the overruling of an objection thereto did not necessarily involve any right under the federal Constitution.

2. COURTS ⇐396(4)—ASSERTION OF FEDERAL RIGHT IN STATE SUPREME COURT INSUFFICIENT TO AUTHORIZE REVIEW BY FEDERAL SUPREME COURT.

Assuming that a right under the federal Constitution was properly claimed in the trial court, where the claim was not presented to or passed upon by the state Supreme Court, there was no basis for a review by the federal Supreme Court.

3. COURTS ⇐396(5)—ASSERTION OF FEDERAL RIGHT COMES TOO LATE IN PETITION FOR WRIT OF ERROR AND ASSIGNMENT OF ERRORS.

Where a claim of a right under the federal Constitution was not presented to or passed upon by the state Supreme Court, it was too late to present the matter in the petition for a writ of error and in the assignment of errors filed in the federal Supreme Court.



4. COURTS ~~396~~(4)—FAILURE TO SET UP FEDERAL QUESTION IN STATE COURT NOT CURED BY ALLOWANCE OF WRIT OF ERROR.

Where no federal question was set up in the state Supreme Court, the omission was not cured by the allowance of a writ of error by the Chief Justice of that court.

In Error to the Supreme Court of the State of North Carolina.

Suit by the Carolina-Tennessee Power Company against the Hiawassee River Power Company. A decree for plaintiff was affirmed by the Supreme Court of North Carolina (175 N. C. 670, 96 S. E. 99), and defendant brings error. Dismissed for want of jurisdiction.

Mr. Eugene R. Black, of Atlanta, Ga., for plaintiff in error.

Mr. Julius C. Martin, of Asheville, N. C., for defendant in error.

\*342

\*Mr. Justice BRANDEIS delivered the opinion of the Court.

The Carolina-Tennessee Power Company, a public utility, was incorporated by a private law of North Carolina with broad powers, including that of taking by eminent domain riparian lands of and water rights in any nonnavigable stream of the state. It filed locations for two hydro-electric plants on the Hiawassee river and proceeded to acquire by purchase and by condemnation the lands and water rights necessary for that development. Thereafter the Hiawassee River Power Company was organized under the general laws of the state and threatened to locate and develop on that river hydro-electric plants which would necessarily interfere with the development undertaken by the Carolina-Tennessee Company. The latter brought in the superior court of Cherokee county a suit in the nature of a bill to quiet title. The case was tried in that court with the aid of a jury. Many issues of fact were raised and many questions of state law presented. A decree entered for the plaintiff below was reversed by the Supreme Court of the state and a new trial was ordered. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349. The second trial resulted also in a decree for plaintiff below which was affirmed by the state Supreme Court. 175 N. C. 670, 96 S. E. 99. The case comes here on writ of error.

[1] The federal question relied upon as giving jurisdiction to this court is denial of the claim that the private law incorporating the Carolina-Tennessee Company is invalid, because it conferred upon that company broad powers of eminent domain, whereas the general law, under which the Hiawassee Company was later organized, conferred no such right; the contention being that thereby the guaranty of the Fourteenth Amend-

ment of privileges and immunities and equal protection of the laws had been violated. But this claim was not presented to nor passed

\*343

upon by the \*Supreme Court of the state. The only basis for the contention that it was so presented is the fact that, when the Carolina-Tennessee Company offered in evidence at the trial in the superior court the private law as its charter, objection was made to its admission "on the ground that the same was in terms and effect a monopoly and a void exercise of power by the state Legislature which undertook to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the Fourteenth Amendment," and that the admission of this evidence is among the many errors assigned in the Supreme Court of the state. The law, whether valid or invalid, was clearly admissible in evidence, as it was the foundation of the equity asserted in the bill. No right under the federal Constitution was necessarily involved in that ruling. The reference to the "bill of rights and the Constitution" made when objecting to the admissibility of the evidence was to the state Constitution and the point was not again called to the attention of that court. Compare *Hulbert v. Chicago*, 202 U. S. 275, 279, 280, 26 Sup. Ct. 617, 50 L. Ed. 1026. The claim of invalidity under the state Constitution was specifically urged in that court as a reason why the Carolina-Tennessee Company should be denied relief and the claim was passed upon adversely to the plaintiff in error; but no reference was made in that connection to the Fourteenth Amendment.

[2-4] If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see *Clarke v. McDade*, 165 U. S. 168, 172, 17 Sup. Ct. 284, 41 L. Ed. 673; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, 22 Sup. Ct. 120, 46 L. Ed. 171; *Marvin v. Trout*, 199 U. S. 212, 217, 224, 26 Sup. Ct. 31, 50 L. Ed. 157), still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the

\*344

record, otherwise presented to or \*passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, Indianapolis, etc., Ry. v. McGuire*, 196 U. S. 128, 132, 25 Sup. Ct. 200, 49 L. Ed. 413. The omission to set it up properly in the Supreme Court of the state was not cured by the allowance of the writ of error by its Chief

Justice. *Appleby v. City of Buffalo*, 221 U. S. 524, 529, 31 Sup. Ct. 699, 55 L. Ed. 838; *Hulbert v. Chicago*, 202 U. S. 275, 280, 26 Sup. Ct. 617, 50 L. Ed. 1026; *Marvin v. Trout*, 199 U. S. 212, 223, 26 Sup. Ct. 31, 50 L. Ed. 157.

We have no occasion, therefore, to consider whether the claim of denial of rights under the Fourteenth Amendment, was substantial in character which is required to support a writ of error. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311, 23 Sup. Ct. 123, 47 L. Ed. 190. Compare *Henderson Light & Power Co. v. Blue Ridge Railway*, 243 U. S. 563, 37 Sup. Ct. 440, 61 L. Ed. 900.

Dismissed for want of jurisdiction.

(252 U. S. 313)

**REDERIAKTIEBOLAGET ATLANTEN v. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.**

(Argued March 10, 1920. Decided March 22, 1920.)

No. 171.

1. **ARBITRATION AND AWARD** ⇐7 — **REFUSAL TO PROCEED WITH VOYAGE NOT COVERED BY PROVISION OF CHARTER PARTY AS TO ARBITRATION; "DISPUTE."**

The refusal of a steamship owner to proceed with the voyage for which the steamer was chartered was not such a "dispute" as was covered by a clause of the charter party providing that, if any dispute arose, it would be settled by referees, one to be appointed by the captain, one by the charterers, and, if necessary, the arbitrators to appoint an umpire.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dispute.]

2. **ADMIRALTY** ⇐61 — **ALLEGATIONS AS TO FOREIGN LAW RESPECTING ARBITRATION CONSTRUED.**

In a suit in admiralty for breach of a charter party, an allegation of the answer that a provision of the charter for arbitration of any dispute was binding by the laws of Sweden and Denmark, and that arbitration was a condition precedent to the right to sue, merely meant that the agreement would be enforced according to its intent, and did not extend the scope, or affect the construction, of the provision.

3. **SHIPPING** ⇐141(1)—**LIMITATION OF LIABILITY IN CHARTER NOT APPLICABLE TO INEXCUSABLE REFUSAL TO UNDERTAKE VOYAGE.**

The provision of a charter that penalty for nonperformance should be proved damages, not exceeding the estimated amount of freight, if treated as a limitation of liability, did not apply to a case of willful unexcused refusal to go on with the voyage.

4. **EVIDENCE** ⇐81—**MARITIME LAW OF ENGLAND PRESUMED FOLLOWED IN CONTINENTAL EUROPE.**

The rule in England that a provision of a charter providing that the penalty for nonperformance shall be proved damages, not exceeding the estimated amount of freight, is a

penalty only, and does not prevent recovery on the ordinary liability on the undertakings of the contract, is presumed to represent the continental point of view.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel in admiralty by the Aktieselskabet Korn-Og Foderstof Kompagniet against the Rederiaktiebolaget Atlanten. A decree for the libellant (232 Fed. 403) was affirmed by the Circuit Court of Appeals for the Second Circuit (250 Fed. 935), and the claimant brings certiorari. Affirmed.

See, also, 248 U. S. 553, 39 Sup. Ct. 8, 63 L. Ed. 418.

Messrs. John W. Griffin, of New York City, and Clarence Bishop Smith, of New York City, for petitioner.

Mr. Roscoe H. Hupper, of New York City, for respondent.

\*314

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a libel in admiralty by a Danish corporation, the respondent here, against a Swedish corporation, owner of the steamship Atlanten, for breach of a charter party made in Denmark, on September 30, 1914. The voyage was to be from a southern port in the United States to Danish ports to be named. On January 8, 1915, the owner (the petitioner) wrote to the charterers that owing to the increased war risk and other difficulties "we are compelled to cancel the Atlanten's charter party Pensacola to Scandinavia, and are ready to take all the consequences the Court after Clause No. 24 in the charter party will compel us to pay, not exceeding the estimated amount of freight." It offered to proceed, however, if the charterers would pay a higher rate. This libel was brought five months later. The owner in its answer admitted the breach, but set up the

\*315

clause 24 of the charter, "Penalty for non-performance of this agreement to be proved damages, not exceeding estimated amount of freight," and clause 21, "If any dispute arises the same to be settled by two referees, one to be appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision \* \* \* shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other or others, as liquidated damages, the estimated amount of chartered freight." It is alleged that by the laws of both Denmark and Sweden such a provision is binding and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter. The case was heard on exceptions to the answer. The District Court made a de-



(40 Sup.Ct.)

cree for the libellant for full damages, Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 232 Fed. 403, and this decision was affirmed by the Circuit Court of Appeals, 250 Fed. 935, 163 C. C. A. 185, Ann. Cas. 1918E, 491.

[1, 2] With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us. For this case it is enough that we agree substantially with the views of Judge Learned Hand in the District Court and Judge Hough in the Circuit Court of Appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply. It is true that it would be inaccurate to say that the owner repudiated the contract in toto, for the letter that we have quoted assumed that the contract was binding and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. *United States v. McMullen*, 222 U. S. 460, 471, 32 Sup. Ct. 128, 56 L. Ed. 269. But we agree that such a refusal was not a "dispute" of the kind referred to in the arbitration clause.

As Judge Hand remarked, the withdrawal

\*316

was before \*the voyage began and it is absurd to suppose that the captain, who might be anywhere in the world, was to be looked up and to pick an arbitrator in such a case. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in *Jureidini v. National British & Irish Millers Ins. Co., Ltd.*, [1915] A. C. 499, 505. The allegation in the answer as to the laws of Denmark and Sweden we do not understand to mean more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, as we should construe it apart from that allegation, does not apply to the present case.

[3, 4] Paragraph 24 of the charter, supposed to limit liability, may be met in similar and other ways. If it were a limitation of liability it hardly could be taken to apply to a case of wilful unexcused refusal to go on with the voyage. It obviously was not intended to give the owner an option to go on or stop at that price. But furthermore, as was fully pointed out below, the clause is a familiar modification of a very old one, and in the courts of England that have had frequent occasion to deal with it, is held to be only a penalty, even in the present form, and to leave the ordinary liability upon the undertakings of the contract unchanged. *Wall v. Rederiaktiebolaget Luggode*,

[1915] 3 K. B. 66; *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.*, [1917] A. C. 227; [1916] 2 K. B. 826, 844; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406. Presumably this is also the continental point of view. We are of opinion that the decree was clearly right.

Decree affirmed.

(252 U. S. 344)

# STATE OF ARKANSAS v. STATE OF MISSISSIPPI.

(Submitted March 8, 1920. Decided March 22, 1920.)

## No. 7, Original.

STATES ~~vs.~~ 12(2)—BOUNDARY BETWEEN ARKANSAS AND MISSISSIPPI LOCATED.

The boundary line between Arkansas and Mississippi south of a point about one mile southwest of Friars Point, Miss., is in the middle of the main channel of navigation of the Mississippi river as it existed in 1783, subject to such changes as have since occurred through natural and gradual processes, but unaffected by the avulsion occurring about 1848, and resulting in the formation of a new main channel of navigation.

## In Equity.

Original suit by the State of Arkansas against the State of Mississippi. On motions for the appointment of a commission to run, locate, and designate the boundary line, Commissioners appointed and instructed as to their duties.

See, also, 250 U. S. 39, 39 Sup. Ct. 422, 63 L. Ed. 832.

Messrs. John D. Arbuckle, Atty. Gen., John M. Moore, of Little Rock, Ark., and Herbert Pope, of Chicago, Ill., for State of Arkansas.

Messrs. Frank Roberson, Atty. Gen., Gerald Fitz Gerald and George F. Maynard, both of Clarksdale, Miss., and Marcellus Green and Garner W. Green, both of Jackson, Miss., for State of Mississippi.

This cause came on to be heard by this Court on the motions and suggestions of counsel for the respective parties for the appointment of a commission to run, locate, and designate the boundary line between the States of Arkansas and Mississippi as indicated in the opinion of this Court delivered

\*345

on the 19th day of May, 1919, and \*thereupon and on consideration thereof, It is ordered, adjudged and decreed as follows, viz.:

1. The true boundary line between the States of Arkansas and Mississippi, at the places in controversy in this cause, aside from the question of the avulsion of 1848, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi River as it existed at the Treaty of

Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion which occurred about 1848, and which resulted in the formation of a new main channel of navigation, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of said river, or the bed of said river, which ceased to be the main channel of navigation as the result of said avulsion, according to the middle of the main navigable channel as it existed immediately prior to the time of said avulsion.

4. A commission consisting of Samuel S. Gannett, Washington, D. C., Charles H. Miller, Little Rock, Arkansas, and Stevenson Archer, Jr., Greenville, Mississippi, competent persons, is here and now appointed by the Court, to run, locate and designate the boundary line between said States along that portion of said river which ceased to be a part of the main navigable channel of said river as the result of said avulsion, in accordance with the above principles: Commencing at a point in said Mississippi River about one mile southwest from Friars Point, Coahoma County, Mississippi, where the main navigable channel of said river, prior to said avulsion, turned and flowed in a southerly direction, and thence following

\*346

along the middle of the former main \*channel of navigation by its several courses and windings to the end of said portion of said Mississippi River which ceased to be a part of the main channel of navigation of said river as the result of said avulsion of 1848.

5. In the event the said Commission cannot now locate with reasonable certainty the line of the river as it ran immediately before the avulsion of 1848, it shall report the nature and extent of the erosions, accretions and changes that occurred in the old channel of navigation as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said Commission shall give its findings of fact and the evidence on which same are based.

6. Before entering upon the discharge of their duties, each of said Commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties hereinafter imposed; said oaths to be taken before the Clerk of this Court, or before the clerk of any District Court of the United States, or before an officer authorized by law to administer an oath in the State of Arkansas or Mississippi, and returned with

their report. Said Commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of the said boundary line; to examine and consider carefully the printed record in this cause and the opinion of this Court delivered on May 19, 1919, and to take such additional evidence under oath as may be necessary and authorized to enable said Commission to determine said boundary line, but such evidence shall be taken only upon notice to the parties with permission to attend by counsel and cross-examine the witnesses; to compel the attendance of witnesses and require them to testify; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved, certified and returned with the

\*347

report of said Commissioners; and \*said Commission shall do all other matters necessary to enable it to discharge its duties and to obtain the end to be accomplished conformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said Board of Commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this Court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said Commissioners do proceed with all convenient dispatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the cooperation and assistance of the State authorities of Arkansas and Mississippi, or either of those States, in the performance of the duties hereby imposed.

9. It is further ordered that the Clerk of this Court shall forward at once to the Governor of each of said States of Arkansas and Mississippi and to each of the Commissioners hereby appointed a copy of this decree and of the opinion of this Court delivered herein May 19, 1919, duly authenticated.

10. Said Commissioners shall make a report of their proceedings under this decree as soon as practicable on or before the first day of October, 1920, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report, or until such time as matters pertaining to this cause shall be properly presented to this Court for its consideration.

Per Mr. Chief Justice WHITE.



(252 U. S. 317)

(40 Sup.Ct.)

## MANNERS v. MOROSCO.

(Argued March 2, 1920. Decided March 22, 1920.)

No. 370.

1. COPYRIGHTS 48—LICENSE FOR USE OF COPYRIGHTED PLAY NOT LIMITED TO FIVE YEARS.

An exclusive license to produce a copyrighted play, requiring the licensee to produce it for at least 75 performances during a given season and for each theatrical season thereafter for 5 years, and providing for forfeiture if it was not produced for the specified number of performances, was not limited, as to duration, to 5 years, especially where it provided for the release of the play for stock companies in case it failed in New York and on the road.

2. COPYRIGHTS 48—LICENSE FOR USE OF COPYRIGHTED PLAY HELD NOT TO GRANT MOVING PICTURE RIGHTS.

Where an exclusive license for the production of a copyrighted play required 75 performances each theatrical season, provided for royalties, consisting of specified percentages of the gross weekly receipts, required the play to be presented in first-class theaters with a competent company, and with the author's wife in the title rôle and provided that no alterations, eliminations, or additions should be made without the author's approval, and that rehearsals and the production of the play should be under his direction, it did not grant the right to produce the play in moving pictures.

3. COPYRIGHTS 48—LICENSOR IMPLIEDLY COVENANTS NOT TO PRODUCE PLAY IN MOVING PICTURES.

Though an exclusive license to produce a copyrighted play did not grant the licensee the right to produce it in moving pictures, it was an implied covenant that the licensor would not destroy the value of the right granted by so producing it.

Mr. Justice Clarke and Mr. Justice Pitney dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by J. Hartley Manners against Oliver Morosco. A decree dismissing the bill (254 Fed. 737) was affirmed by the Circuit Court of Appeals for the Second Circuit (258 Fed. 557), and plaintiff brings certiorari. Reversed, and injunction granted on condition.

See, also, 250 U. S. 638, 39 Sup. Ct. 494, 63 L. Ed. 1183.

Messrs. David Gerber and Walter C. Noyes, both of New York City, and William J. Hughes, of Washington, D. C., for petitioner.

Mr. Charles H. Tuttle, of New York City, for respondent.

\*323

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the author of a play called

Peg O' My Heart to restrain the defendant, Morosco, from representing the play in motion pictures, in violation of the plaintiff's copyright; and also, although this is a subsidiary question, from producing the play at all. The defendant justifies under an agreement of January 19, 1912, and a supplemental agreement of July 20, 1914, both set forth in the bill. The ground upon which the right to produce the play in any way was denied was that the agreement gave rights only for five years. This construction was rejected by the District Court and the Circuit Court of Appeals. Both Courts held also that the agreement conveyed the right to represent the play in moving pictures and on that ground dismissed the bill. 254 Fed. 737; 258 Fed. 557.

By the first agreement the plaintiff, party of the first part "does grant" to Morosco, the party of the second part, "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada," subject to the terms and condi-

\*324

tions of the contract. Morosco \*agrees "to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years." He agrees further to pay specified percentages on the gross weekly receipts as royalties, and that "if during any one theatrical year \* \* \* said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part." Morosco further agrees to present the play in first-class theatres with competent companies and with Miss Laurette Taylor (the stage name of the author's wife) in the title rôle; the play to have a production in New York and to be continued on the road for at least one season or longer if considered advisable by both parties. No alterations, eliminations or additions are to be made without the approval of the author and the rehearsals and production of the play are to be under his direction. The author to have the right to print and publish the play but not within six months after the production of the play in New York City without consent. Morosco is not to let or transfer his rights without the author's consent. "Should the play fail in New York City and on the road it shall be released for stock;" i. e., let to stock companies, with an equal division of royalties between plaintiff and defendant. By an addendum, after Miss Taylor should have finished her season her successor in the rôle of "Peg" for any subsequent tours shall be mutually agreeable to

both parties. The contract is declared binding upon the parties, "their heirs, executors, assigns, administrators and successors."

The second agreement, in order to adjust controversies and to modify the first, authorized Morosco "as long as this contract is in force" "to produce, perform and represent" the play with or in as many companies as he

\*325

saw fit, \*without engaging Laurette Taylor and without consulting the plaintiff as to the cast, rehearsals or production of the play. Morosco also was authorized to let or sell any of his rights under the contracts, but he was not to be released from his personal liability to pay the royalties as specified in the contracts. The play might be released for stock whenever the net profits realized from all the companies producing the play should be less than \$2,000, and then the royalties received from the stock theatres were to be divided equally. For four years from date neither party without consent of the other was to produce or give leave to produce the play by moving pictures and after that the rights of the parties were to be determined by and under the original agreement as if the supplemental agreement had not been made.

[1] As to the duration of the defendant's rights we agree with the Courts below. We perceive no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913-1914, and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least the defendant was to do, not of the most that he was to have. The plaintiff was secured sufficiently by the forfeiture in case the play should not have been produced for seventy-five performances. The provisions in both contracts as to the release for stock are somewhat of an additional indication that it was expected that the arrangement was to last as long as the public liked the play well enough to make it pay, provided the defendant kept his half of the bargain performed.

[2] On the question principally argued we are of opinion that the majority below was wrong. The thing granted was "the sole and exclusive license and liberty to produce, perform and represent" the play within the territorial limits stated, subject to the other

\*326

terms of the contract. \*It may be assumed that those words might carry the right to represent the play in moving pictures if the other terms pointed that way, but to our mind they are inconsistent with any such intent. We need not discuss the abstract question whether, in view of the fact that such a mode of representation was familiar, it was to be expected that it should be mentioned if it was to be granted or should be excluded if it was to be denied. Every detail

shows that a representation by spoken drama alone is provided for. The play is to be continued for seventy-five performances for the theatrical seasons named. This applies only to the regular stage. The royalties are adapted only to that mode of presentation. *Harper Bros. v. Klaw* (D. C.) 232 Fed. 609, 612. The play is to be presented in first-class theatres with a competent company and with Miss Laurette Taylor in the title rôle, which, of course, does not mean in moving pictures. The stipulations against alterations, eliminations or additions, and that the rehearsals and production of the play shall be under the direction of the author, denote the same thing, and clearly indicate that no other form of production is contemplated. The residuary clause, so to speak, by which the play is to drop to stock companies shows the lowest point to which the author was willing to let it go.

[3] The Courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama, with respect for the author's natural susceptibility concerning a strict adhesion to the text. We need not amplify the argument presented below against the reser-

\*327

vation of the right in \*question. As was said by Judge Hough in a similar case:

"There is implied a negative covenant on the part of the [grantor] \* \* \* not to use the ungranted portion of the copyright estate to the detriment, if not the destruction, of the licensees' estate. Admittedly, if *Harper Bros.* (or *Klaw and Erlanger*, for the matter of that) permitted photo-plays of *Ben Hur* to infest the country, the market for the spoken play would be greatly impaired, if not destroyed." *Harper Bros. v. Klaw* (D. C.) 232 Fed. 609, 613.

The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States.

Decree reversed. Injunction to issue upon the condition that the plaintiff shall neither represent nor authorize the representation of the play *Peg O' My Heart* in moving pictures while the contract with the defendant remains in force.

Mr. Justice CLARKE dissenting.

The decision of this case involves the construction of the written contract of January 19, 1912, as modified by that of July 20, 1914, and, centering its attention upon the claim of the defendant to moving picture rights



the court dismisses in a single paragraph provisions in these contracts which seem to me to so clearly limit the rights of the defendant to a term expiring possibly in May, 1918, but certainly not later than May, 1919, that I cannot concur in the conclusion arrived at by my Associates.

The court says:

"As to the duration of the defendant's rights we agree with the Courts below. We see no ground for converting the defendant's undertaking to continue the play for seventy-five per-

\*328

formances during the season of 1913-1914, \*and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least that defendant was to do, not of the most that he was to have."

This expression, that the third paragraph of the contract of January 19, 1912, "is a statement of the least that defendant was to do, not of the most that he was to have," is repeated in the opinion of each of the three courts as the sufficient reason for concluding, as the District Court said, that the contract gave to the defendant "all the rights mentioned for all time." It is not the first time that a catchy phrase has diverted attention from less picturesque realities.

My reasons for concluding that the rights of the defendant were limited, as the court says his obligations were limited, to a term expiring not later than the close of the theatrical season of 1918-1919, may be briefly stated.

The grant which it is concluded gave the defendant the exclusive license and liberty to "produce, perform and represent" the play involved "for all time" is in these words:

"First. The party of the first part hereby grants \* \* \* to the party of the second part, *subject to the terms, conditions and limitations hereinafter expressed*, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States" and Canada.

In terms this is a "license," and in terms also it is subject to "conditions and limitations" to follow in the contract, which are found in the third and fifth paragraphs.

The third paragraph reads:

"The party of the second part [defendant] agrees to produce the play not later than January 1st, 1913, and to continue said play for at

\*329

least seventy-five per\*formances during the season 1913-1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides that if the defendant shall fail to produce the play seventy-five times in any one theatrical year—

"then all rights of the said party of the second part [the defendant] shall cease and determine and shall immediately revert to the said party of the first part."

This third paragraph expresses the agreement of the parties as to what the defendant was to do in consideration of the grant by the plaintiff in the first paragraph, and reading it and the fifth paragraph together, as one, we have the extreme extent and time limit of the defendant's obligation and the penalty forfeiture, is provided for the failure to perform at any time within that limit. The court says that the third paragraph expresses "the least (all) that the defendant was to do," so that his obligation under the contract ended with the five-year period, which obviously would be not later than the close of the theatrical season of 1918-1919. This being true, when did the reciprocal obligation of the plaintiff expire?

That the obligation of the plaintiff continued "for all time" is apparently derived wholly from the inference, as stated by the District Court, that the parties, if they had intended otherwise, "could readily have fixed a time limit in the first paragraph by the addition of words such as 'for ——— years from' or 'until' a stated date."

It is very true that the parties could have written their contract in a different form, and certainly with much more precision of statement, than that in which they did write it, but it is also true that in making it in their own way and terms they granted a general license in the first paragraph, but made it subject to the "terms, conditions and limitations" thereafter to be expressed, and that they then went forward and expressed in the third paragraph the five-year limitation as we have seen it.

\*330

The \*court holds that this five-year limitation applies to the defendant's obligation to perform but that it does not apply to the plaintiff's license to produce. I think it applies to both. Plainly the parties were undertaking to set down in their contract the mutual obligations which each intended to assume—those of the one in consideration of those of the other. The author granted the privilege of producing the play and the defendant agreed to produce it for at least 75 performances during each of five years. After that, the court concludes, the defendant was no longer bound by the contract to do anything which could advantage the plaintiff and therefore, clearly, the plaintiff should not continue thereafter under obligation to the defendant, unless the intention to be so bound is unmistakably expressed in his contract. The "natural and normal" inference is that when the obligation of one party to such a contract as we have here is ended it was the intention that the obligation of the other party should end also.

The inference that the license to produce continued after the obligation to produce expired, in my judgment, can be sustained only by neglecting the specific provision of the

first paragraph, that the license granted is subject to the limitations which should follow, and which did follow in the third paragraph. It involves imposing, by judicial construction, heavy and unusual burdens upon the author of a successful dramatic composition in the interest of a commercial producer—a result which courts should not strain themselves to accomplish.

A penalty of forfeiture being provided for failure of the defendant to perform at any time, I cannot see any substantial reason for inserting the five-year limitation except to fix a limit for the expiration of all rights of both parties and this, it seems to me, was its only function.

The provision in the first contract that if the play should fail "in New York and on

\*331  
the road," and in the \*second that if the net profits for "one theatrical season" should be less than \$2,000, the play should be "released for stock" and the royalties divided equally between the parties, would have ample scope for the application within the five-year period and therefore cannot properly be made the basis for the implied continuance of the license beyond that term.

For the reasons thus briefly stated, I think that the parties expressed with sufficient clearness their intention that their mutual relations should all terminate with the expiration of the five-year period, and therefore I dissent from the opinion of the court.

Mr. Justice PITNEY concurs in this opinion.

(252 U. S. 331)

OKLAHOMA OPERATING CO. v. LOVE  
et al.

(Submitted Oct. 9, 1919. Decided March 22, 1920.)

No. 129.

1. CONSTITUTIONAL LAW ¶298(1)—LAUNDRY COMPANY ENTITLED TO REVIEW IN COURTS OF RATES PRESCRIBED BY CORPORATION COMMISSION.

An order of a state Corporation Commission prohibiting a laundry company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates and was a legislative order, and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory.

2. MANDAMUS ¶73(1)—PROHIBITION ¶6(2)—IT MUST BE ASSUMED THAT NEITHER REMEDY WILL LIE TO REVIEW ORDERS OF CORPORATION COMMISSION FIXING RATES.

As Const. Okl. art. 9, § 20, has been construed by the state Supreme Court as not permitting a direct appeal from orders of the Corporation Commission fixing rates, it must be assumed, in the absence of a decision of the

state court to the contrary, that neither mandamus nor prohibition is available for review of an order alleged to be void, because confiscatory, notwithstanding the proviso that mandamus and prohibition shall lie from the Supreme Court to the commission in cases where such writs would lie to any inferior court or officer.

3. CONSTITUTIONAL LAW ¶303—ENFORCEMENT OF ORDERS OF CORPORATION COMMISSION BY PENALTIES WITHOUT OPPORTUNITY FOR REVIEW IS UNCONSTITUTIONAL.

Rev. Laws Okl. 1910, § 8235, construed by the state court as authorizing no review of the orders of the commission fixing rates, except by an appeal in contempt proceedings for violation of the order, which violation may be punished by a penalty of \$500 per day, is unconstitutional, so far as it provides for the enforcement of the prescribed rates by penalties, because of the absence of an opportunity for a judicial review satisfying the constitutional requirements.

4. PUBLIC SERVICE COMMISSIONS ¶24—JURISDICTION WILL BE RETAINED TO GIVE COMPLETE RELIEF IN SUIT TO ENJOIN ENFORCEMENT OF ORDER FIXING RATES.

Where it was necessary to resort to a federal court of equity to restrain a Corporation Commission from enforcing an order fixing rates, because of the absence of any provision for a judicial review, the court will retain jurisdiction to determine whether the rates fixed are confiscatory, though pending the suit the Legislature has provided for a judicial review of such orders.

5. PUBLIC SERVICE COMMISSIONS ¶21—COMMISSION WILL NOT BE RESTRAINED FROM INVESTIGATING RATES AND PRACTICES.

In a suit in a federal court to restrain a state Corporation Commission from enforcing an order fixing maximum rates for laundry work claimed to be confiscatory, the commission will not be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the federal District Court.

Appeal from the District Court of the United States for the Western District of Oklahoma.

Suit by the Oklahoma Operating Company against J. E. Love and others, composing the Corporation Commission of the State of Oklahoma. From an order denying a motion for a preliminary injunction, plaintiff appeals. Reversed and remanded.

See, also, 39 Sup. Ct. 387.

\*332

\*Mr. C. B. Ames, of Oklahoma City, Okl., for appellant.

Mr. S. P. Freeling, of Oklahoma City, Okl., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought in the District Court of the United States for the Western Dis-



trict of Oklahoma by the Oklahoma Operating Company against the Corporation Commission of that state to enjoin it from entertaining complaints against the company for the violation of orders limiting the rates

\*333

for laundry work in Oklahoma City \*therefore entered by the Commission, under section 8235<sup>1</sup> of the Revised Laws of Oklahoma (1910); and from doing any other acts or things to enforce said orders. The case comes here under section 266 of the Judicial Code (Comp. St. § 1243) by direct appeal from an order denying a motion for a preliminary injunction heard before three judges. The appellant presents to this court the question whether section 8235 is void under the Fourteenth Amendment, contending that under the laws of the state there was no opportunity of reviewing judicially a legislative rate fixed pursuant to that section, except by way of defense to proceedings for contempt which might be instituted for violating the order, and that the possible penalties for such violation were so heavy as to prohibit resort to that remedy.

The bill as amended makes the following allegations: In 1913 the Commission entered an order declaring the Oklahoma Operating Company a monopoly and its business a public one, and directed it not to increase the rates then being charged except upon application to and permission of the Commission. Since that time operating costs have risen

\*334

greatly and rates for laundry work prevailing in 1913 have become noncompensatory. Accordingly in January, 1918, the company moved the Commission to set aside its order of 1913 on the ground that the laundry business was not within the purview of section 8235, that the company was not a monopoly within the meaning of that section, and that the section was void. The Commission denied this motion, and thereafter the company established rates higher than those prevailing in 1913. On account of this it is now threatened with proceedings for contempt. Since the establishment of these higher rates the company has been summoned before the Commission to give information as to the cost

<sup>1</sup> 8235. *Public Business Defined.* Whenever any business by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand \* \* \* or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the state, by the corporation commission or by an action in any district court of the state, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

of performing laundry service in Oklahoma City and information in general to determine what may be reasonable rates for laundry service in that city. Upon these allegations a preliminary injunction was sought below to restrain the Commission from entertaining complaints for violation of its order fixing rates and to enjoin it from proceeding with the investigation regarding the cost of the service.

The scope of section 8235 and the prescribed course of proceedings thereunder, as construed by the Supreme Court of the state (*Harriss-Irby Cotton Co. v. State*, 31 Okl. 603, 122 Pac. 163; *Shawnee Gas & Electric Co. v. State*, 31 Okl. 505, 122 Pac. 222; *Oklahoma Gin Co. v. State* [Okl.] 158 Pac. 629), in connection with other legislation (sections 1192 to 1207 of the Revised Code of 1910) and provisions of the state Constitution (article 9, sections 18 to 23), are, so far as here material, these: Whenever any business, by reason of its nature, extent, or the exercise of a virtual monopoly therein, is such that the public must use the same or its services, it is deemed a public business, and as such is subject to the duty to render its services upon reasonable terms without discrimination. If any public business violates such duty the Corporation Commission has power to regulate its rates and practices. Disobedience to an order establishing rates may be punished as a contempt and the Commission

\*335

has power, \*sitting as a court, to impose a penalty therefor not exceeding \$500 a day. Each day's continuance of failure or refusal to obey the order constitutes a separate offense. The original order may not be made nor any penalty imposed except upon due notice and hearing. No court of the state, except the Supreme Court by way of appeal, may review, correct or annul any action of the Commission within the scope of its authority or suspend the execution thereof; and the Supreme Court may not review an order fixing rates by direct appeal from such order. But in the proceedings for contempt the validity of the original order may be assailed; and for that purpose, among others, new evidence may be introduced. When a penalty for failure to obey an order has been imposed an appeal lies to the Supreme Court. On this appeal the validity of the original order may be reviewed; the appeal is allowed as of right upon filing a bond with sureties in double the amount of the fine imposed; the filing of the bond suspends the fine; and the period of suspension may not be computed against a concern in fixing the amount of liability for fines.

[1, 2] The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth

Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 456-458, 10 Sup. Ct. 462, 33 L. Ed. 970; *Ex parte Young*, 209 U. S. 123, 165, 166, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The Constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the Supreme Court (article 9, section 20); and the Supreme Court had construed the Constitution and applicable provisions of the statutes as not permitting a

\*336 direct appeal from \*orders fixing rates. *Harris-Irby Cotton Co. v. State*, supra. On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the Supreme Court of the state. But, in view of the provision of the state Constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso "that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer," appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question, not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment. Compare *Hirsh v. Twyford*, 40 Okl. 220, 230, 139 Pac. 313.

[3] So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. Article 9, sections 18, 19. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal

\*337 to \*obey an order may be \$500; and each day's continuance of the refusal after service of the order it is declared "shall be a separate offense." The penalty may apparently be imposed for each instance of violation of the or-

der. In *Oklahoma Gin Co. v. State*, 252 U. S. 339, 40 Sup. Ct. 341, 64 L. Ed. —, decided this day, it appears that the full penalty of \$500, with the provision for the like penalty for each subsequent day's violation of the order, was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. *Ex parte Young*, 209 U. S. 123, 147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Missouri Pacific Railway Co. v. Tucker*, 230 U. S. 340, 349, 33 Sup. Ct. 961, 57 L. Ed. 1507; *Wadley Southern Railway v. Georgia*, 235 U. S. 651, 662, 35 Sup. Ct. 214, 59 L. Ed. 405.

[4] The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. Since this suit was commenced, the Legislature has provided by chapter 52, section 3, of the Laws of 1919 (Sess. Laws Oklahoma 1919, p. 87) that in actions arising before the Commission under section 8235 there shall be the same right of direct appeal to the Supreme Court of the state as had theretofore existed in the case of transportation and transmission companies under article 9, section 20, of the Constitution. But as plaintiff was obliged to resort to a federal court of equity for relief it ought to retain jurisdiction of the cause in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require. The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunc-

\*338 tion should issue to restrain their \*enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders. *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 538, 36 Sup. Ct. 715, 60 L. Ed. 1148. If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory.

[5] It does not follow that the Commission need be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the District Court herein. Indeed, such investigation and



the results of it might with appropriateness be made a part of the final proofs in the cause.<sup>2</sup>

These conclusions require that the decree of the District Court be reversed and that the case be remanded for further proceedings in conformity with this opinion.

Reversed.

(252 U. S. 339)

# OKLAHOMA GIN CO. v. STATE OF OKLAHOMA.

(Submitted Oct. 9, 1919. Decided March 22, 1920.)

No. 32.

CONSTITUTIONAL LAW  $\hookrightarrow$ 303—PUBLIC SERVICE COMMISSIONS  $\hookrightarrow$ 2—STATUTE IMPOSING PENALTIES FOR VIOLATION OF ORDERS OF CORPORATION COMMISSION VOID FOR LACK OF JUDICIAL REVIEW.

Rev. Laws Okl. 1910, § 8235, so far as it provides penalties for disobedience of orders of the Corporation Commission fixing rates, violates the Fourteenth Amendment, because of the lack of any opportunity for a judicial review of such orders.

In Error to the Supreme Court of the State of Oklahoma.

Proceeding before the Corporation Commission of Oklahoma by the State of Oklahoma against the Oklahoma Gin Company. The order of the Commission imposing a fine, etc., was affirmed by the Oklahoma Supreme Court (158 Pac. 629), and the Gin Company brings error. Reversed.

See, also, 39 Sup. Ct. 387, 40 Sup. Ct. 338.

<sup>2</sup>In *Ex parte Young*, 209 U. S. 123, 133, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, the District Court appears to have considered whether the rates were reasonable although the penal features of the act were declared void. *Missouri Pac. Ry. Co. v. Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507, was an action for the penalty; and the question here raised was not involved. That it is the penalty provision and not the rate provision which is void appears from the cases in which the validity of statutes was sustained because the objectionable penalty provisions were severable and there was no attempt to enforce the penalties. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53, 29 Sup. Ct. 192, 53 L. Ed. 332, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 417, 29 Sup. Ct. 527, 53 L. Ed. 838; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 443, 30 Sup. Ct. 535, 54 L. Ed. 826; *Atchison, etc., Ry. Co. v. O'Connor*, 223 U. S. 280, 286, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 662, 35 Sup. Ct. 214, 59 L. Ed. 405.

Mr. C. B. Ames, of Oklahoma City, Okl. for plaintiff in error.

Messrs. S. P. Freeling and Paul A. Walker, both of Oklahoma City, Okl., for the State of Oklahoma.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Corporation Commission of Oklahoma having found under section 8235 of the Revised Laws of 1910 that the Oklahoma Gin Company and four other concerns in the town of Chandler had combined and raised the charges for ginning cotton, and on October 17, 1913, fixed a schedule of rates lower than those then in force. The company thereafter charged rates in excess of those so fixed, and three separate complaints against it alleging violation of the order were filed with the Commission. Being summoned

\*340

\*to show cause why it should not be punished for contempt the company admitted violation of the order, but alleged that it was void, among other reasons, because section 8235 was in conflict with the Fourteenth Amendment. After a full hearing, at which new evidence was introduced, the Commission affirmed, on October 10, 1914, the rates fixed, made a finding that the violation of the order was willful, imposed on the company a fine of \$500 and costs under each of the three separate complaints, directed refund of all amounts collected in excess of prescribed rates, and declared also:

"A fine will be imposed for each day the order has been violated, and the matter as to the number of days and the amounts of fines to be imposed upon defendant, other than those mentioned in the information, will be left open for adjustment upon taking of evidence as to the number of days violated."

An appeal was taken by the company to the Supreme Court of the state, which affirmed the order, and thereafter denied two petitions for rehearing. The case comes here on writ of error under section 237 of the Judicial Code as amended (Comp. St. § 1214).

This case was argued and submitted with *Oklahoma Operating Co. v. Love et al.*, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. —, decided this day. For the reasons set forth in the opinion in that case, the provision concerning penalties for disobedience to an order of the Commission was void, because it deprived the company of the opportunity of a judicial review. The judgment must therefore be reversed. It is unnecessary to consider other contentions of plaintiff in error.

Reversed.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(251 U. S. 546)

No. 163. *The ATLANTIC COAST LINE RAILROAD COMPANY*, appellant, v. *The UNITED STATES*. March 1, 1920. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 638. Mr. Ben Carter, of Washington, D. C., for appellant. The Attorney General for the United States.

PER CURIAM. Affirmed upon the authority of *Achison, Topeka & Santa Fé Ry. Co. v. United States*, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236.

(251 U. S. 546)

No. 218. *CITY OF FULTON*, plaintiff in error, v. *PUBLIC SERVICE COMMISSION OF MISSOURI*, etc., et al. March 1, 1920. In error to the Supreme Court of the State of Missouri. For opinion below, see 275 Mo. 67, 204 S. W. 386. Mr. Eugene C. Brokmeyer, of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054. See *City of Chicago v. Dempcy*, 250 U. S. 651, 40 Sup. Ct. 53, 63 L. Ed. 1189, decided Nov. 10, 1919.

(251 U. S. 547)

No. 215. *The STATE OF MISSOURI* at the relation of *The CITY OF SEDALIA*, plaintiff in error, v. *The PUBLIC SERVICE COMMISSION OF MISSOURI*, etc. March 1, 1920. In error to the Supreme Court of the State of Missouri. For opinion below, see 275 Mo. 201, 204 S. W. 497. Mr. E. C. Brokmeyer, of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054. See *City of Chicago v. Dempcy*, 250 U. S. 651, 40 Sup. Ct. 53, 63 L. Ed. 1189, decided Nov. 10, 1919.

(251 U. S. 547)

No. 277. *Laforest L. SIMMONS*, plaintiff in error, v. *Joe DUART*. March 1, 1920. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion below, see *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10. Mr. Edward C. Stone, of Boston, Mass., for plaintiff in error. Mr. David R. Radovsky, of Fall River, Mass., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(251 U. S. 550)

No. 674. *NORFOLK-SOUTHERN RAILROAD COMPANY*, petitioner, v. *M. R. OWENS*. March 1, 1920. For opinion below, see *Owens v. Hines*, 100 S. E. 617. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted.

(251 U. S. 561)

No. 659. *Clarence E. REED*, petitioner, v. *HUGHES TOOL COMPANY*. March 1, 1920. For opinion below, see 261 Fed. 192. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(251 U. S. 562)

No. 661. *Gutierrez HERMANOS*, petitioner, v. *The INSULAR COLLECTOR OF CUSTOMS*. March 1, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(251 U. S. 562)

No. 673. *WABASH RAILWAY COMPANY*, petitioner, v. *Charlotte SHEEHAN*, administratrix, etc. March 1, 1920. Petition for a writ of certiorari to the Appellate Court, Third District of the State of Illinois, denied.

(251 U. S. 562)

No. 687. *POSTAL TELEGRAPH-CABLE COMPANY*, petitioner, v. *BOWMAN & BULL COMPANY*. March 1, 1920. For opinion below, see *Bowman & Bull Co. v. Postal Telegraph-Cable Co.*, 290 Ill. 155, 124 N. E. 851. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(251 U. S. 562)

No. 688. *The MALLEABLE IRON RANGE COMPANY*, petitioner, v. *Fred E. LEE*, as administrator, etc. March 1, 1920. For opinion below, see 263 Fed. 896. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(251 U. S. 563)

No. 695. *Robert L. FINK*, petitioner, v. *OKMULGEE WINDOW GLASS COMPANY*. March 1, 1920. For opinion below, see *Okmulgee Window Glass Co. v. Fink*, 260 Fed. 159. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(251 U. S. 563)

No. 700. *Herman M. WARTELL*, petitioner, v. *Ralph S. MOORE*, trustee, etc. March 1, 1920. For opinion below, see 261 Fed. 762. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(251 U. S. 548)

No. 125. *Kate C. ARCHER*, administratrix of *George F. Archer*, deceased, et al., appellants, v. *The UNITED STATES*; and

No. 220. *The UNITED STATES*, appellant, v. *Kate C. ARCHER*, administratrix of *George F. Archer*, deceased, et al. March 1, 1920. For opinion below, see 53 Ct. Cl. 405. Messrs. Percy Bell, of Greenville, Miss., and T. M. Miller, of New Orleans, La., for appellants. The Attorney General for the United States. Appeals from the Court of Claims. Judgment affirmed by an equally divided Court.



(251 U. S. 568)

No. 14. Original. The STATE OF NEW YORK, complainant, v. INTERNATIONAL NICKEL COMPANY. March 1, 1920. Messrs. F. La Guardia and Edgar Bromberger, both of New York City, and Merton E. Lewis, of Rochester, N. Y., for complainant. Messrs. W. J. Curtis and Ligon Johnson, both of New York City for respondent. Dismissed, per stipulation.

(251 U. S. 568)

No. 15. Original. The STATE OF NEW YORK, complainant, v. STANDARD OIL COMPANY. March 1, 1920. Messrs. F. La Guardia and Edgar Bromberger, both of New York City, and Merton E. Lewis, of Rochester, N. Y., for complainant. Mr. Chester O. Swain, of New York City, for respondent. Dismissed, per stipulation.

(251 U. S. 568)

No. 477. WYSONG & MILES COMPANY et al., plaintiffs in error, v. PLANTERS' NATIONAL BANK OF RICHMOND. March 1, 1920. In error to the Supreme Court of the State of North Carolina. For opinion below, see *Planters' Nat. Bank of Virginia v. Wysong & Miles Co.*, 177 N. C. 380, 99 S. E. 199. Mr. Thomas J. Jerome, of Greensboro, N. C., for plaintiffs in error. Mr. Garland S. Ferguson, Jr., of Greensboro, N. C., for defendant in error. Dismissed, per stipulation.

(251 U. S. 568)

No. 478. WYSONG & MILES COMPANY et al., plaintiffs in error, v. BANK OF NORTH AMERICA, PHILADELPHIA, PA. March 1, 1920. In error to the Supreme Court of the State of North Carolina. For opinion below, see *Bank of North America v. Wysong & Miles Co.*, 177 N. C. 394, 99 S. E. 207. Mr. Thomas J. Jerome, of Greensboro, N. C., for plaintiffs in error. Mr. Garland S. Ferguson, Jr., of Greensboro, N. C., for defendant in error. Dismissed, per stipulation.

(251 U. S. 569)

No. 612. Fred S. THOMPSON, appellant, v. Alexander H. NICHOLS. March 1, 1920. Appeal from the District Court of the United States for the District of Maine. For opinion below, see 254 Fed. 973. Mr. Charles Henry Butler, of Washington, D. C., for defendant in error. Dismissed per stipulation. Mandate granted on motion of Mr. Charles Henry Butler for the defendant in error.

(252 U. S. 588)

No. 225. D. H. GILL et al., plaintiffs in error, v. The CITY OF DALLAS et al. March 5, 1920. In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. For opinion below, see 209 S. W. 209. Mr. William H. Clark, of Dallas, Tex., for plaintiffs in error. Dismissed with costs, pursuant to the tenth rule.

(252 U. S. 567)

No. 418. PRUDENTIAL INSURANCE COMPANY OF AMERICA, plaintiff in error, v. Robert T. CHEEK. March 8, 1920. In error to the Supreme Court of the State of Missouri. For opinion below, see *Cheek v.*

*Prudential Ins. Co. of America*, 209 S. W. 928. Mr. Samuel W. Fordyce, Jr., of St. Louis, Mo., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Schlosser v. Hemphill*, 198 U. S. 173, 175, 25 Sup. Ct. 654, 49 L. Ed. 1000; *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; *Gray's Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 255, 37 Sup. Ct. 295, 61 L. Ed. 702; *Bruce v. Tobin*, 245 U. S. 18, 19, 38 Sup. Ct. 7, 62 L. Ed. 123.

(252 U. S. 567)

No. 669. GULF & SHIP ISLAND RAILROAD COMPANY et al. plaintiffs in error, v. Carl BOONE et al., etc. March 8, 1920. In error to the Supreme Court of the State of Mississippi. For opinion below, see 82 South. 335. Messrs. B. E. Eaton, of Gulfport, Miss., and T. J. Wills, of Raleigh, Miss., for petitioner. Mr. George Anderson, of Vicksburg, Miss. (Messrs. Anderson, Vollor & Kelly, of Vicksburg, Miss., A. W. Dent, of Mendenhall, Miss., and E. L. Dent, of Collins, Miss., of counsel), for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *McCorquodale v. Texas*, 211 U. S. 432, 29 Sup. Ct. 146, 53 L. Ed. 269; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 326, 334, 33 Sup. Ct. 510, 57 L. Ed. 857; *St. Louis & San Francisco R. R. Co. v. Shepherd*, 240 U. S. 241, 36 Sup. Ct. 274, 60 L. Ed. 622; *Bilby v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(252 U. S. 567)

No. 692. CHEATHAM ELECTRIC SWITCHING DEVICE COMPANY, appellant, v. TRANSIT DEVELOPMENT COMPANY et al. March 8, 1920. Appeal from the District Court of the United States for the Eastern District of New York. Messrs. O. Ellery Edwards, Jr., and Albert M. Austin, both of New York City, for plaintiff. Mr. Thomas J. Johnston, of New York City (Messrs. Emery, Varney, Blair & Hogue, of New York City, of counsel), for appellees.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 37, 14 Sup. Ct. 4, 37 L. Ed. 986; *Brown v. Alton Water Co.*, 222 U. S. 325, 332-334, 32 Sup. Ct. 156, 56 L. Ed. 221; *Metropolitan Water Co. v. Kaw Valley District*, 223 U. S. 519, 522, 32 Sup. Ct. 246, 56 L. Ed. 533; *Shapiro v. United States*, 235 U. S. 412, 416, 35 Sup. Ct. 122, 59 L. Ed. 291; and see *Red Jacket, Jr., Coal Co. et al. v. United Thacker Coal Co.*, 248 U. S. 531, 39 Sup. Ct. 5, 63 L. Ed. 405.

(252 U. S. 568)

No. —, Original. UNION TRUST COMPANY v. WOODWARD & LOTHROP. March 8, 1920. Petition for allowance of an appeal herein denied.

(252 U. S. 568)

No. —, Original. Ex parte In the matter of James F. BISHOP, administrator of the estate of Herman A. RISTOW, deceased, pe-

tioner. March 8, 1920. Motion for leave to file a petition for a writ of prohibition herein denied.

(252 U. S. 576)

No. 697. John P. GALBRAITH, petitioner, v. John VALLELY, trustee, etc. March 8, 1920. For opinion below, see 261 Fed. 670. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(252 U. S. 576)

No. 712. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. Addie SPEIGHT. March 8, 1920. For opinion below, see Speight v. Western Union Tel. Co., 100 S. E. 351. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted.

(252 U. S. 576)

No. 746. Henry KRICHMAN, petitioner, v. The UNITED STATES of America. March 8, 1920. For opinion below, see 263 Fed. 538. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(252 U. S. 577)

No. 678. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, petitioner, v. O. C. SWAIM. March 8, 1920. For opinion below, see Swain v. Chicago, R. I. & P. R. Co., 170 N. W. 296, 174 N. W. 384. Messrs. J. G. Gamble and Fred W. Sargent, both of Des Moines, Iowa, for plaintiff in error. Messrs. Harriet B. Evans, and C. H. Howell, C. H. Elgin, and M. M. Howell, all of Centerville, Iowa, for defendant in error. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

(252 U. S. 577)

No. 682. J. B. POLLARD, petitioner, v. The UNITED STATES of America. March 8, 1920. For opinion below, see 261 Fed. 336. Mr. William Hawley Atwell, of Dallas, Tex., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 577)

No. 686. Ada GRIFFITH, petitioner, v. The UNITED STATES of America. March 8, 1920. For opinion below, see 261 Fed. 159. Mr. Benjamin C. Bachrach, of Chicago, Ill., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(252 U. S. 578)

No. 701. Frederick M. KILMER, trustee for Alice F. Kilmer, petitioner, v. Charles H. KEITH, trustee, etc. March 8, 1920. For opinion below, see Keith v. Kilmer, 261 Fed. 733. Messrs. Samuel D. Elmore and Elbridge R. Anderson, both of Boston, Mass., for petitioner. Messrs. Lee M. Friedman and Percy A. Atherton, both of Boston, Mass., for respondent.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(252 U. S. 578)

No. 703. Rome LANE, on behalf of himself and others, petitioner, v. The EQUITABLE TRUST COMPANY OF NEW YORK. March 8, 1920. For opinion below, see 262 Fed. 918. Messrs. Wells H. Blodgett and Clifford B. Allen, both of St. Louis, Mo., for petitioner. Messrs. George Welwood Murray and Lawrence Greer, both of New York City, and Theodore Rasseleur, of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(252 U. S. 578)

No. 704. Maria Eloisa ROCHA, petitioner, v. Emilia TUASON y Patino et al. March 8, 1920. Mr. W. A. Kincaid, of Manila, P. I., for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(252 U. S. 578)

No. 711. HUDSON NAVIGATION COMPANY, petitioner, v. J. ARON & COMPANY (Inc.) et al. March 8, 1920. For opinion below, see The St. Paul, 262 Fed. 1021. Mr. Stuart G. Gibboney, of New York City, for appellant. Messrs. Charles R. Hickox and T. Catesby Jones, both of New York City, for J. Aron & Co. Mr. George H. Mitchell, of New York City, for Hamilton-Beers Corporation. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 579)

No. 718. CAMP BIRD, Limited, petitioner, v. Frank W. HOWBERT, as collector of internal revenue, etc. March 8, 1920. For opinion below, see 262 Fed. 114. Messrs. William Story, Jr., of Ouray, Colo., and William V. Hodges, of Denver, Colo., for petitioner. Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., and Mr. W. C. Herron, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(252 U. S. 579)

No. 721. The PHILLIPS COMPANY, petitioner, v. Byron F. EVERITT, trustee, etc. March 8, 1920. For opinion below, see 262 Fed. 341. Messrs. William L. Carpenter, of Detroit, Mich., Thomas H. Gill, of Milwaukee, Wis., and Thomas G. Long, of Detroit, Mich., for petitioner. Messrs. Clarence A. Lightner and Walter E. Oxtoby, both of Detroit, Mich., for defendant. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(252 U. S. 579)

No. 722. Alfred R. SWANN, petitioner, v. W. W. AUSTELL, executor, etc., et al. March 8, 1920. For opinion below, see 261 Fed. 465. Messrs. Daniel W. Rountree and Clifford L. Anderson, both of Atlanta, Ga., for petitioner. Messrs. Jack J. Spalding and Chas. T. Hop-



kins, both of Atlanta, Ga., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 579)

No. 732. William F. HANRAHAN, petitioner, v. PACIFIC TRANSPORT COMPANY (Ltd.). March 8, 1920. For opinion below, see 262 Fed. 951. Mr. Silas B. Axtell, of New York City, for petitioner. Messrs. Kirlin, Woolsey & Hickox, of New York City (Messrs. Robert S. Ersking and L. De Grove Potter, both of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 580)

No. 748. E. B. CAPPS, administrator, etc., petitioner, v. The ATLANTIC COAST LINE RAILROAD COMPANY. March 8, 1920. For opinion below, see 101 S. E. 216. Mr. James S. Manning and Jas. H. Pou, both of Raleigh, N. C., for petitioner. Messrs. F. D. McKenney, of Washington, D. C., P. A. Willcox, of Florence, S. C., C. H. Davis, of Wilmington, N. C., and F. S. Spruill, of Rocky Mount, N. C., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(252 U. S. 580)

No. 749. J. W. ATKINS, petitioner, v. L. G. GARRETT. March 8, 1920. For opinion below, see Garrett v. Atkins, 261 Fed. 587. Messrs. Kirlin, Woolsey & Hickox, of New York City (Mr. Cletus Keating, of New York City, of counsel), for petitioner. Mr. Silas B. Axtell, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 580)

No. 750. MARYANNE SHIPPING COMPANY, Claimant of The steamship MARYANNE, petitioner, v. RAMBERG IRON WORKS. March 8, 1920. For opinion below, see 262 Fed. 129. Messrs. Horace L. Cheyney and Ralph J. M. Bullowa, both of New York City, for petitioner. Mr. Francis Martin, of New York City (Mr. George V. A. McCloskey, of New York City, on the brief), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 580)

No. 754. CRICKET STEAMSHIP COMPANY, petitioner, v. John P. PARRY. March 8, 1920. For opinion below, see 263 Fed. 523. Messrs. Kirlin, Woolsey & Hickox, of New York City (Mr. Cletus Keating, of New York City, of counsel), for petitioner. Mr. Silas B. Axtell, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 570)

No. —. Original. The STATE OF NEW JERSEY, complainant, v. A. Mitchell PALMER, Attorney General, et al. March 15, 1920. On motion for leave to file original bill.

Order. Application for leave to file bill granted and process ordered; but should the Attorney General be advised to move to dismiss, a motion to advance the hearing on the motion to dismiss to the earliest practicable day will be entertained, in order that the issues arising from such motion may be considered in connection with the controversies now under advisement resulting from the original bill filed by the State of Rhode Island and other causes involving kindred questions which are now also under submission.

(252 U. S. 569)

No. 230. C. C. TAFT COMPANY, plaintiff in error, v. The STATE OF IOWA. March 15, 1920. In error to the Supreme Court of the State of Iowa. For opinion below, see, State v. C. C. Taft Co., 183 Iowa, 548, 167 N. W. 467. Mr. Fred P. Carr, of Des Moines, Iowa, for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of the act of September 6, 1916, c. 448, § 6, 39 Stat. 726, 727 (Comp. St. § 1214).

(252 U. S. 570)

No. 236. James P. PARSONS, plaintiff in error, v. William H. MOOR et al. March 15, 1920. For opinion below, see Moor v. Parsons, 98 Ohio St. 233, 120 N. E. 305. Mr. Charles F. Carusi, of Washington, D. C., for plaintiff in error. In error to the Supreme Court of the State of Ohio.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 569)

No. 262. VIRGINIA & WEST VIRGINIA COAL COMPANY, plaintiff in error, v. Green CHARLES. March 15, 1920. In error to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 254 Fed. 379, 165 C. C. A. 599. Mr. S. B. Avis, of Charleston, W. Va., for plaintiff in error. Mr. William H. Werth, of Tazewell, Va., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) section 128 of the Judicial Code Comp. St. § 1120; Shulthis v. McDougal, 225 U. S. 561, 568, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; St. Anthony's Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Devine v. Los Angeles, 202 U. S. 313, 333, 26 Sup. Ct. 652, 50 L. Ed. 1046.

(252 U. S. 589)

No. 293. The UNITED STATES of America, plaintiff in error, v. H. L. SPRINKLE. March 15, 1920. In error to the District Court of the United States for the Southern District of Florida. Mr. Solicitor General King, for

plaintiff in error. N. P. Bryan, of Jacksonville, Fla., for defendant in error. Dismissed, on motion of Mr. Solicitor General King for the plaintiff in error.

(252 U. S. 568)

No. 312. John M. TANANEVICZ, plaintiff in error, v. The PEOPLE OF THE STATE OF ILLINOIS. March 15, 1920. In error to the Supreme Court of the State of Illinois. For opinion below, see *People v. Tananevicz*, 285 Ill. 376, 120 N. E. 766. Mr. Emory J. Smith, of Chicago, Ill., for plaintiff in error. Mr. Edward J. Brundage, of Chicago, Ill., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 326, 334, 33 Sup. Ct. 605, 57 L. Ed. 982; *St. Louis & San Francisco R. R. Co. v. Shepherd*, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622; *Bilby v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; (2) *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *United Surety Co. v. American Fruit Produce Co.*, 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; (3) section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stats. 726 (Comp. St. § 1214).

No. 328. KANSAS CITY, plaintiff in error, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. March 15, 1920. See, also, 250 U. S. 652, 40 Sup. Ct. 54, 63 L. Ed. 1190. Mr. Matthew A. Fyke, of Kansas City, Mo., for

plaintiff in error. Motion to retax costs in this case denied.

(252 U. S. 580)

No. 709. Walter F. BRITTON, trustee, etc., petitioner, v. UNION INVESTMENT COMPANY. March 15, 1920. For opinion below, see 262 Fed. 111. Messrs. Kay Todd, Walter Fosnes and Charles W. Sterling, all of St. Paul, Minn. (Mr. Harrison L. Schmitt, of Minneapolis, Minn., of counsel), for petitioner. Messrs. Wm. A. Lancaster, David F. Simpson, and R. G. Patton, all of Minneapolis, Minn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(252 U. S. 581)

No. 725. Walter M. REEDER et al., petitioners, v. The UNITED STATES of America. March 15, 1920. For opinion below, see 262 Fed. 36. Mr. John W. Seothorn, of Oklahoma City, Okl., for petitioners. Mr. R. P. Stewart, Assistant Attorney General, and W. C. Heron, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(252 U. S. 581)

No. 739. ATCHAFALAYA LAND COMPANY, petitioner, v. Paul CAPDEVIELLE, auditor, et al. March 15, 1920. For opinion below, see *State ex rel. Board of Com'rs of Atchafalaya Basin Levee Dist. v. Capdeville*, 83 South. 421. Messrs. George Janvier, of New Orleans, La., Burke & Smith, Walter J. Burke, Ventress J. Smith and F. E. Delahoussaye, all of New Iberia, La., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.



(252 U. S. 364)

COLLINS v. MILLER, U. S. Marshal.

CARLISLE, British Consul General, v.  
COLLINS.

(Argued Dec. 9, 1919. Decided March 29, 1920.)

Nos. 350 and 351.

1. COURTS  $\S$ 385(6)—QUESTIONS AS TO CONSTRUCTION OF TREATY REVIEWABLE BY SUPREME COURT ON DIRECT APPEAL.

Questions as to the construction of a treaty are reviewable by the Supreme Court on direct appeal from District Court, under Judicial Code,  $\S$  238 (Comp. St.  $\S$  1215).

2. APPEAL AND ERROR  $\S$ 66—DIRECT APPEAL OR WRIT OF ERROR LIES TO FEDERAL SUPREME COURT ONLY FROM FINAL JUDGMENT.

The Supreme Court has jurisdiction on direct writ of error and appeal under Judicial Code,  $\S$  238 (Comp. St.  $\S$  1215), as under other sections, only from final judgments.

3. HABEAS CORPUS  $\S$ 113(3) — JURISDICTION OF DIRECT APPEAL IN HABEAS CORPUS PROCEEDINGS LIMITED TO FINAL JUDGMENTS.

The rule that final judgments only are reviewable by direct appeal under Judicial Code,  $\S$  238 (Comp. St.  $\S$  1215), applies to habeas corpus proceedings.

4. APPEAL AND ERROR  $\S$ 23—FEDERAL SUPREME COURT MUST DETERMINE QUESTION AS TO FINALITY OF JUDGMENT ON ITS OWN MOTION.

When the question whether the judgment appealed from is a final one suggests itself to the Supreme Court, it must be answered, though not raised by either party.

5. HABEAS CORPUS  $\S$ 113(3)—JUDGMENT ON HABEAS CORPUS TO REVIEW EXTRADITION PROCEEDINGS NOT FINAL.

Where, in a habeas corpus proceeding to review extradition proceedings instituted on three separate affidavits, the court denied or rather dismissed the writ as to the commitment on one of the affidavits, but granted the writ as to the commitments on the other affidavits, remanded the case for further hearing before the judge making the commitments, and remanded the petitioner to the house of detention to await further proceedings on such affidavits, the judgment was not final, so as to support an appeal, as the writ had not been disposed of so far as concerned the detention on two of the affidavits.

6. EXTRADITION  $\S$ 17—PROCEEDINGS BEFORE COMMITTING MAGISTRATE NOT REVIEWABLE BY APPEAL.

Proceedings before a committing magistrate in international extradition are not subject to correction by appeal.

7. HABEAS CORPUS  $\S$ 30(1)—ERRORS NOT ORDINARILY CORRECTIBLE.

It is ordinarily beyond the scope of the review afforded by a writ of habeas corpus to correct error in the proceedings.

8. APPEAL AND ERROR  $\S$ 76(1)—JUDGMENT TO BE APPEALABLE TO FEDERAL SUPREME COURT MUST BE FINAL AS TO ALL MATTERS INVOLVED.

A judgment to be appealable to federal Supreme Court should be final, not only as to all parties, but as to the whole subject-matter and all the causes of action involved.

9. HABEAS CORPUS  $\S$ 113(4) — MARSHAL IS PROPER PARTY TO APPEAL FROM DECISION IN PETITIONER'S FAVOR.

Where a person, committed in extradition proceedings instituted on affidavits filed by the British consul general, petitions for a writ of habeas corpus, the United States marshal holding him in custody, and not the consul general, is the proper party to appeal from a decision in the petitioner's favor.

Appeals from the District Court of the United States for the Eastern District of Louisiana.

Habeas corpus and certiorari by Charles Glen Collins against Frank M. Miller, United States Marshal for the Eastern District of Missouri. From a judgment denying the application for habeas corpus in part, and granting the writs in part, the petitioner and Tom F. Carlisle, British Consul General, bring separate appeals. Appeals dismissed for want of jurisdiction.

## \*365

\*Messrs. J. Zach Spearing, of New Orleans, La., and Guion Miller and J. Kemp Bartlett, both of Baltimore, Md., for petitioner.

Messrs. Charles Fox and Donelson Caffery, of New Orleans, La., for marshal and consul general.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1-4] These are appeals from a single judgment entered by the District Court of the United States for the Eastern District of Louisiana on a petition for writs of habeas corpus and certiorari. The relator had been arrested on extradition proceedings. Each party asks to have reviewed the construction given below to provisions of our treaty with Great Britain, proclaimed August 9, 1842 (8 Stat. 572, 576), and of the supplementary treaty proclaimed April 22, 1901 (32 Stat. 1864). The questions presented are therefore of a character which may be reviewed upon direct appeal under section 238 of the Judicial Code (Comp. St.  $\S$  1215) *Charlton v. Kelly*, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397. But this court has jurisdiction on writ of error and appeal under that section, as under others, only from final judgments. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893; *Heike v. United States*, 217 U. S. 423, 30 Sup. Ct. 539, 54 L. Ed. 821. And the rule applies to habeas corpus proceedings. *Hark-*

rader v. Wadley, 172 U. S. 148, 162, 19 Sup. Ct. 119, 43 L. Ed. 399. The fundamental ques-

\*366

tion whether the judgment appealed from \*is a final one within the meaning of the rule has suggested itself to the court; and it must be answered, although it was not raised by either party. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 24 Sup. Ct. 63, 48 L. Ed. 140. In order to answer the question it is necessary to describe the proceedings before the committing magistrate as well as those in the District Court on the petition for a writ of habeas corpus.

In October and November, 1918, the British consul general at New Orleans filed with the Honorable Rufus E. Foster, District Judge of the United States for the Eastern District of Louisiana, three separate affidavits, each charging that Charles Glen Collins, who was then within the jurisdiction of that court, had committed at Bombay, India, the crime therein described as obtaining property under false pretenses, and that he stood charged therewith in the Chief Presidency Magistrate's Court at Bombay, and asking that he be committed as a fugitive from justice for the purpose of having him returned to India for trial. Warrants of arrest issued, and Collins moved, as to each affidavit, to dismiss for want of jurisdiction, contending that the transactions in question were commercial dealings in which he had merely failed to pay debts incurred. Hearings, entitled "In the Matter of Extradition Proceedings of Charles Glen Collins," were had before Judge Foster, at which the consul general and Collins appeared by counsel. Evidence in support of each of the three affidavits was introduced by the consul general. Then Collins, who was sworn at his request, admitted his identity and that he had been present in India at the times each of the alleged crimes were committed. As to one of the charges, that of obtaining a pearl button from Mohamed Alli Zaimel ali Raza, he was allowed to testify further. But he was not permitted to testify as to matters concerning the other two which had been consolidated. And he was not permitted to introduce other witness-

\*367

es in defense of any of the three \*affidavits. After the hearings were concluded Judge Foster made two orders or judgments signed by him as Judge of said United States District Court and entitled in said court. In these orders he found, as to each of the affidavits, that he deemed the evidence sufficient to sustain the charge under the law and the treaty, and as to each he ordered Collins recommit- ted to the House of Detention in the custody of the United States marshal for that district to await the order of the President of the United States. The two proceedings (which included the three affidavits) were then consolidated. Under date of November 27, 1918, a certificate setting forth his findings togeth-

er with a copy of the record in all the proceedings was transmitted to the Secretary of State.

This petition for writs of habeas corpus and certiorari was filed by Collins, in said District Court, on January 8, 1919. It set forth the proceedings before Judge Foster on the three affidavits, and alleged that his detention was illegal and in violation of rights secured to him by the treaty; among other reasons because he was refused permission to introduce evidence as above mentioned. District Judge Grubb ordered that the writs issue; and the marshal made return setting forth in substance the facts above recited. The case was heard before Judge Grubb on February 21, 1919, the record before Judge Foster being introduced. On the same day Judge Grubb, without delivering an opinion, entered an order which declared that "relator's application for habeas corpus is denied" so far as concerned the charge of obtaining the pearl button from Mohamed Alli Zaimel ali Raza, and that "the writs of habeas corpus are granted" so far as the detention was based on the other two charges, but that the relator be remanded to the House of Detention to await further proceedings in said last two named affidavits.

"And it is further ordered that, as to the said two affidavits last mentioned, this cause be and

\*368

is hereby re\*manded to the Honorable Rufus E. Foster, judge, to the end that relator be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana.

Neither party took any action in respect to such further proceedings before Judge Foster. On March 3, 1919, Collins petitioned for leave to appeal, contending that he should have been discharged on all three affidavits and his appeal was allowed. This is case No. 350 on the docket of this court. Later the British consul general petitioned for leave to appeal on the ground that Collins' application should have been definitely denied also as to the commitment on the other two affidavits. His appeal, being No. 351 on the docket of this court, was allowed March 28, 1919.

[5-7] First. Was the judgment appealed from a final one? A single petition for a writ of habeas corpus thus sets forth detention of the relator on three separate affidavits. As to the commitment on one of these, the judgment entered by Judge Grubb directed that the writ be "denied." Such denial, or more appropriately dismissal, of the writ would obviously have been a final judgment, if it had stood alone. *McNamara v. Henkel*, 226 U. S. 520, 523, 33 Sup. Ct. 146, 57 L. Ed. 330. But the judgment appealed from dealt also with the detention on the other two affidavits. It declared that "the writs of habeas corpus are granted" as to the commitments on the other two affidavits, and ordered that



the case be remanded for further hearing before Judge Foster.

What was thus called granting the writ was not a discharge of the prisoner, deferred as in *In re Medley*, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835, and in *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; or made conditional as in *United States v. Petkos*, 214 Fed. 978, 131 C. C. A. 274; *Billings v. Sitner*, 228 Fed. 315, 142 C. C. A. 607, and *Ex Parte Romano* (D. C.) 251 Fed. 762; or coupled with other disposition of him as in

\*369

*In re Gut Lun* (D. C.) 84 Fed. 323, and *Ex parte Gytel* (D. C.) 210 Fed. 918, 924. It more nearly resembles the kind of an order which an appellate tribunal enters on reversing and remanding the judgment of a lower court upon finding error in its proceedings. But the proceeding before a committing magistrate in international extradition is not subject to correction by appeal. See *Fong Yue Ting v. United States*, 149 U. S. 698, 714, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Sternaman v. Peck*, 80 Fed. 883, 26 C. C. A. 214. Compare *United States v. Ferreira*, 13 How. 40, 48, 14 L. Ed. 42; *The United States, Petitioner*, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931. And it is ordinarily beyond the scope of the review afforded by a writ of habeas corpus to correct error in the proceedings. In *re Kaine*, 14 How. 103, 122, 14 L. Ed. 345; *Ex parte Harding*, 120 U. S. 782, 784, 7 Sup. Ct. 780, 30 L. Ed. 824; *Charlton v. Kelly*, 229 U. S. 447, 457, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397; *Henry v. Henkel*, 235 U. S. 219, 228, 35 Sup. Ct. 54, 59 L. Ed. 203. The order resembles, also, that which might be entered by a District Judge after having reviewed the proceedings taking place before a United States commissioner, under the court's authority to assume control in the preliminary stages of matters of which it has the final decision under the law. *United States v. Berry* (D. C.) 4 Fed. 779, 781; *In re Chin K. Shue* (D. C.) 199 Fed. 282, 284; *The Mary* (D. C.) 233 Fed. 121, 124. Compare *Todd v. United States*, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982; *United States v. Allred*, 155 U. S. 591, 594, 15 Sup. Ct. 231, 39 L. Ed. 273; *In re Perkins* (D. C.) 100 Fed. 950, 954. For an extradition commissioner is an officer of the court which appoints him. See *Grin v. Shine*, 187 U. S. 181, 187, 23 Sup. Ct. 98, 47 L. Ed. 130; *In re Grin* (C. C.) 112 Fed. 790, 794. But here the extradition commissioner had certified his findings to the Secretary of State before the petition for writ of habeas corpus was filed. Whether, for this reason, the time had not passed when the court could correct the action of its commissioner, except upon reopening of the proceeding before him with the consent of the executive (see 6 Op. Atty. Gen. 91)—or, in other words, whether in such a case the power of the court is not limited to ordering the discharge of the prisoner ei-

\*370

ther absolutely \*or conditionally except upon a rehearing before the commissioner with the consent of the President—this question, we are not required to consider at this time. For the proceeding ordered by Judge Grubb had not been taken; nor had the power sought to be exercised by him been challenged. Nor need we consider whether Judge Grubb, having found that a proper hearing had been denied by the committing magistrate on the two affidavits, might have heard the case de novo, and have determined thereon whether the prisoner should be discharged (compare *Chin Yow v. United States*, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; *Whitfield v. Hanges*, 222 Fed. 745, 746, 138 C. C. A. 199; *United States v. Williams* [D. C.] 193 Fed. 228), for Judge Grubb did not undertake to do so. The prisoner remained under the authority of the District Court (see *Mr. Justice Nelson in In re Kaine*, 14 How. 103, 133, 134, 14 L. Ed. 345); and as the writ of habeas corpus had not been disposed of there, so far as concerned the detention on two of the three affidavits, the decision below on that branch of the case was not final.

[8] Second. A case may not be brought here by appeal or writ of error in fragments. To be appealable, the judgment must be, not only final, but complete. *United States v. Girault*, 11 How. 22, 32, 13 L. Ed. 587; *Holcombe v. McKusick*, 20 How. 552, 554, 15 L. Ed. 1020; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 4, 1 Sup. Ct. 15, 27 L. Ed. 73; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, 431, 1 Sup. Ct. 414, 27 L. Ed. 237; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; *Covington v. Covington First National Bank*, 185 U. S. 270, 277, 22 Sup. Ct. 645, 46 L. Ed. 906; *Heike v. United States*, 217 U. S. 423, 429, 30 Sup. Ct. 539, 54 L. Ed. 821; *Rexford v. Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346, 33 Sup. Ct. 515, 57 L. Ed. 864. And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; *Sheppy v. Stevens*, 200 Fed. 946, 119 C. C. A. 330. The seeming exception to this rule by which an adjudication final in

\*371

its nature of \*matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final, so as to authorize an appeal without awaiting the termination of the general litigation below (*Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 224, 10 Sup. Ct. 736, 34 L. Ed. 97; *Williams v. Morgan*, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157), has no application here. Nor have cases like *Forgay v. Conrad*, 6 How. 201, 204, 21 L. Ed. 404, and *Thomson v. Dean*, 7 Wall.



342, 345, 19 L. Ed. 94, where decrees finally disposing of property which the successful party was entitled to have carried into execution immediately, were held appealable, although certain accounts pursuant to the decree remained to be settled. Here a single judgment deals with the detention on three affidavits. Only one branch of the case has been finally disposed of below; therefore none of it is ripe for review by this court.

[9] Third. In what has been said we must not be understood as recognizing the British consul general as the party entitled to appeal from a decision in Collins' favor. For the writ of habeas corpus was directed to the United States marshal, who held Collins in custody, and the marshal was the party in whom rested the right to appeal, if Collins prevailed on final judgment. See *Charlton v. Kelly*, *supra*.

Both appeals are

Dismissed for want of jurisdiction.

(252 U. S. 348)

STRATHEARN S. S. CO., Limited, v.  
DILLON.

(Argued and Submitted Dec. 9, 1919. Decided  
March 29, 1920.)

No. 373.

1. SEAMEN ⇨24—STATUTE AUTHORIZING DEMAND FOR HALF WAGES IN EACH PORT APPLIES TO FOREIGN SEAMEN.

Rev. St. § 4530, as amended by Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), authorizing every seaman on a vessel of the United States to receive one-half of the wages then earned at every port, and providing that such section shall apply to seamen on foreign vessels while in harbors of the United States, is not limited to American seamen.

2. STATUTES ⇨211 — TITLE CANNOT LIMIT TEXT, THOUGH IT MAY BE LOOKED TO IN CASE OF DOUBT.

The title of an act cannot limit the plain meaning of the text, though it may be looked to in aid of construction in cases of doubt.

3. CONSTITUTIONAL LAW ⇨70(3)—INQUIRY INTO WISDOM OF LEGISLATION NOT WITHIN THE PROVISION OF THE SUPREME COURT.

If Congress had authority to enact Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), entitling seamen to demand one-half of their wages at each port, and declaring void all stipulations in the contract to the contrary, it is not within the province of the Supreme Court to inquire whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course.

4. CONSTITUTIONAL LAW ⇨89(1) — SEAMEN ⇨4—LAW AS TO PAYMENT OF SEAMEN'S WAGES NOT INVALID.

Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), authorizing every seaman, including seamen on foreign vessels while in harbors of

the United States, to demand one-half of the wages then earned at every port, and declaring void stipulations in the contract to the contrary, is not invalid as destructive of contract rights, as it is for this government to determine upon what terms and conditions vessels of other countries may be permitted to enter our harbors.

5. SEAMEN ⇨24—DEMAND FOR WAGES DUE SEAMAN ON FOREIGN VESSEL MAY BE MADE WITHIN FIVE DAYS AFTER ARRIVAL IN PORT.

Under Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322) authorizing seamen, including seamen on foreign vessels while in American harbors, to demand one-half of the wages then earned at every port, a seaman on a foreign vessel need not wait five days after arrival in an American port before demanding the half of his wages, nor is the amount demandable limited to the wages earned in American ports.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Libel by John Dillon against the Strathearn Steamship Company, Limited. A judgment for defendant was reversed by the Circuit Court of Appeals for the Fifth Circuit (256 Fed. 631, 168 C. C. A. 25), and defendant brings certiorari. Affirmed.

See, also, 250 U. S. 638, 39 Sup. Ct. 494, 495, 63 L. Ed. 1184.

Mr. R. J. M. Bullowa, of New York City, for petitioner.

Messrs. George Sutherland, of Washington, D. C., and W. J. Waguespack, of New Orleans, La., for respondent.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, for British Embassy, by special leave.

Mr. Solicitor General King, for the United States, by special leave.

\*351

\*Mr. Justice DAY delivered the opinion of the Court.

This case presents questions arising under the Seamen's Act of March 4, 1915, 38 Stat. 1164. It appears that Dillon, the respondent, was a British subject, and shipped at Liverpool on the eighth of May, 1916, on a British vessel. The shipping articles provided for a voyage of not exceeding three years, commencing at Liverpool and ending at such port in the United Kingdom as might be required by the master, the voyage including ports of the United States. The wages which were fixed by the articles were made payable at

\*352

the end of the voyage. At \*the time of the demand for one-half wages, and at the time of the beginning of the action, the period of the voyage had not been reached. The articles provided that no cash should be advanced abroad or liberty granted other than at the pleasure of the master. This, it is admitted, was a valid contract for the payment of wages under the laws of Great Bri-

tain. The ship arrived at the Port of Pensacola, Florida, on July 31, 1916, and while she was in that port, Dillon, still in the employ of the ship, demanded from her master one-half part of the wages theretofore earned, and payment was refused. Dillon had received nothing for about two months, and after the refusal of the master to comply with his demand for one-half wages, he filed in the District Court of the United States a libel against the ship, claiming \$125.00, the amount of wages earned at the time of demand and refusal.

The District Court found against Dillon upon the ground that his demand was premature. The Circuit Court of Appeals reversed this decision, and held that Dillon was entitled to recover. 256 Fed. 631, 168 C. C. A. 25. A writ of certiorari brings before us for review the decree of the Circuit Court of Appeals.

In *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, and *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208, we had occasion to deal with section 11 of the Seamen's Act (Comp. St. § 8323), and held that it did not invalidate advancement of seamen's wages in foreign countries when legal where made. The instant case requires us to consider now section 4 of the same act. That section amends section 4530, U. S. Revised Statutes, and so far as pertinent provides:

"Section 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the

\*353

contract to the contrary \*shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. \* \* \* And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Comp. St. § 8322.

This section has to do with the recovery of wages by seamen, and by its terms gives to every seaman on a vessel of the United States the right to demand one-half the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the end of the voyage, and stipulations in the contract to the contrary are declared to be void. A failure of the master to comply with the demand releases the seaman from his contract, and entitles him to recover full payment of the wages, and the section is made applicable to seamen on

foreign vessels while in harbors of the United States, and the courts of the United States are open to such seamen for enforcement of the act.

[1] This section is an amendment of section 4530 of the Revised Statutes; it was intended to supplant that section, as amended by the act of December 21, 1898, which provided:

"Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract," etc. Comp. St. § 8323.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the

\*354

\*contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.

[2, 3] It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed "to promote the welfare of American seamen in the merchant marine of the United States." But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea. But the title of an act cannot limit the plain meaning of its text, although it may be look-



ed to aid in construction in cases of doubt. *Cornell v. Coyne*, 192 U. S. 418, 530, 24 Sup. Ct. 383, 48 L. Ed. 504, and cases cited. Apart from the text, which we think plain, it

\*355

is by \*no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subverted, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, *supra*, we found no purpose manifested by Congress in section 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in section 4. Under section 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

[4] We come then to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this

\*356

court. The matter was \*fully considered in *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, in which the previous decisions of this court were reviewed, and the conclusion reached that the jurisdiction of this government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to

foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

[5] But, it is insisted, that Dillon's action was premature as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the District Court, but it was ruled otherwise in the Court of Appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one-half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the right to demand one-half of the amount earned not oftener than once in five days. The section permits

\*357

no \*demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

We agree with the Circuit Court of Appeals of the Fifth Circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the Circuit Court of Appeals for the Second Circuit held in the case of *The Italer*, 257 Fed. 712, 168 C. C. A. 662, that demand, made before the vessel had been in port for five days, was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But, the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the Circuit Court of Appeals and the same is Affirmed.

(252 U. S. 358)

THOMPSON v. LUCAS et al.

THE WESTMEATH.

(Argued Dec. 8, 1919. Decided March 29, 1920.)

No. 391. October Term, 1919.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Peter Lucas and another against the Steamship Westmeath, J. M. Thompson, master and claimant. A decree for the libelants was affirmed by the Circuit Court of Appeals for the Second Circuit (258 Fed. 446, 169 C. C. A. 462), and the claimant brings certiorari. Affirmed.

See, also, 250 U. S. 369, 39 Sup. Ct. 495, 63 L. Ed. 1184.

Messrs. L. de Grove Potter, of White Plains, N. Y., and John M. Woolsey, of New York City, for petitioners.

Mr. W. J. Waguespack, of New Orleans, La., for respondent.

\*363

\*Mr. Justice DAY delivered the opinion of the Court.

This case was argued at the same time as No. 373, just decided.<sup>1</sup> In this case the libelants shipped as part of the crew of the British Steamer Westmeath for a voyage not to exceed one year, before the expiration of which time the vessel arrived in the harbor of New York, where she loaded and discharged cargo. A demand was made for one-half wages under section 4 of the Seamen's Act of 1915 (Comp. St. § 8322). The demand was refused, and an action was begun for full wages. A defense was set up that the libelants were deserters, and, therefore, not entitled to recover. The District Court and the Circuit Court of Appeals held that the libelants' case was made out under the statute. 258 Fed. 446, 169 C. C. A. 462.

\*364

\*The case is controlled by principles which governed the disposition of No. 373. The difference being that it appears in this case that demand was made more than five days after the vessel had arrived in the United States port. In all other respects as to the constitutionality and construction of the statute our judgment in the former case is controlling. It follows that the decree of the Circuit Court of Appeals must be affirmed.

Affirmed.

(252 U. S. 372)

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Submitted March 29. Decided April 1, 1920.)

No. 27, Original.

Original action by the State of Oklahoma against the State of Texas. On motion by the United States for leave to intervene for an injunction and the appointment of a receiver. Motion granted.

<sup>1</sup> 252 U. S. 348, 40 Sup. Ct. 350, 64 L. Ed. —, 40 SUP. CT.—23

Order Granting Injunction and Appointing Receiver.

This cause coming on to be heard on the motion of the United States for leave to intervene herein for an injunction and for the appointment of a receiver, and on the responses made to such motion by the state of Oklahoma and the state of Texas, respectively, and the court being fully advised in the premises,

It is now considered, ordered, and decreed as follows, until the further order of the court:

1. That said motion for leave to intervene herein be, and the same is hereby, granted.

2. The defendant, the state of Texas, her officers and agents, are hereby enjoined from selling any purported rights or making or issuing any grants, licenses or permits to any person, corporation or association covering or affecting any lands, or any part of the bed of Red river, lying north of the line of the south bank of such river as said south bank existed at the date of the ratification of the treaty of 1819 between the United States and Spain; that is to say, on the 22d day of February, 1821, and between the one hundredth degree of west longitude and the southeastern corner of the state of Oklahoma.

3. Jacob M. Dickinson, Esq., of Chicago, Ill.,

\*373

\*is hereby appointed receiver of all the lands described in paragraph 2 of the said intervenor's motion, to wit:

Bounded on the north by the mid-channel of the Red river, as the mid-channel is hereinafter defined; on the east by extension south of the west boundary line of range 10 west between township 4 south, range 10 west, and township 4 south, range 11 west, in Cotton county, Okl., crossing the remaining portion of said Red river and to the foot of the Texas bluffs as the south bank; thence up said river along the foot of the Texas bluffs as the south bank, through ranges 11, 12, 13, and through range 14 as follows: Commencing at a point on the east boundary line of range 14 extended which point is 116.50 chains from the original meander corner of fractional section 31, township 4 south, range 13 west and section 36, township 4 south, range 14 west; thence

N. 79° 00' W. 26.75 chs.  
N. 71° 15' W. 33.00 "  
N. 75° 15' W. 28.25 "  
N. 85° 30' W. 22.60 "  
S. 85° 15' W. 52.20 "  
S. 85° 30' W. 8.90 "  
N. 82° 00' W. 21.40 "  
S. 82° 15' W. 11.50 "  
S. 71° 30' W. 66.70 "  
S. 69° 00' W. 59.25 "

to a point on the present south bank of the Red river which is at the foot of the Texas bluff; thence along the line of the south bank and the foot of the Texas bluff

S. 64° 30' W. 36.00 chs.  
S. 64° 00' W. 20.40 "  
S. 51° 30' W. 44.60 "  
S. 65° 45' W. 24.20 "  
S. 71° 15' W. 54.70 "

\*374

\*to a point on the present south bank of Red river at the foot of the Texas bluff at the intersection of a direct south extension of the west boundary of range 14 west, between fractional section 7, township 5 south, range 14 west, and section 12, township 5 south, range



15, which point is 57.43 chains from the original meander corner of said fractional sections.

Thence continuing up said river along the foot of the Texas bluffs as the south bank, through ranges 15 and 16 to the intersection of the west boundary line of range 16 extended to the foot of the Texas bluffs.

Thence north along said boundary line of range 16 to mid-channel of said river as the same meanders through the broad stretch of sand which in some places extends to and is bounded by the bluffs on either side, and in other places by the margin of the alluvial flood plain on either side, and which is covered with water at times of freshets and entirely devoid of flowing water during the annual dry seasons—and of all machinery, fixtures, tools, and other property of whatever kind or character now on said lands and used in connection with the extraction, storage, transportation, refining, or disposal of the oil or gas products of said lands. And the said receiver is hereby authorized and empowered to take possession of said lands and property forthwith, to take all appropriate measures to conserve the oil and gas within such lands, and to control all operations thereon for the production and disposal of such oil and gas.

4. Within thirty days after taking possession the receiver shall formulate and report to this court full and complete plans for prospecting such lands and developing and producing the oil and gas within the same; and until such report is made and acted upon by the court the receiver shall operate the existing oil and gas wells on said lands, or permit them to be operated by their respective claimants under his

**\*375**

direction and supervision, or \*close down said wells if he shall deem it advisable to do so; and he shall sell at market prices the oil and gas so produced and pay out of the proceeds the necessary expenses of operation and supervision. Full and accurate accounts shall be kept by the receiver of all oil and gas so produced and of the proceeds derived from their sale and the expenses paid therefrom; and these accounts shall be kept in such way that they will show separately the production, proceeds, and expenses pertaining to each well so that the

net proceeds may be ultimately awarded to the rightful claimant.

5. Before entering upon his duties the receiver shall execute a bond to be approved by the court in the sum of one hundred thousand dollars for the faithful performance of his duties including the disbursement and payment according to the court's direction of all moneys which may come into his hands in the course of the receivership.

6. The receiver shall receive such compensation for his services as may be fixed hereafter by the court.

7. The defendant, the state of Texas, and the complainant, the state of Oklahoma, and their respective officers, agents and employes, and all persons now in possession of any of the said lands or claiming any right, title or interest therein, are directed to deliver possession thereof to the said receiver and are enjoined until the further order of this court from removing any of the property herein before described from said lands and from conducting any oil or gas mining operations thereon save under the direction and supervision of the receiver and from interfering with the possession, control or operations of the receiver.

8. As to such of the land before described as is not claimed by the defendant, the state of Texas, in its proprietary capacity said state shall have fifteen days within which to file a

**\*376**

response to the intervenor's motion for an \*injunction and receiver; and on the filing of such response the state of Texas or any claimant claiming under a patent, lease or permit from that state shall be at liberty to request any modification of this order deemed essential or appropriate for the right or full protection of the interest of such state or claimant.

9. Either the plaintiff, the state of Oklahoma, or the intervenor, the United States, may by an amendment of its pleading make any claimant claiming under the state of Texas or any other claimant a party to the cause and have the requisite process issued and served, so that all parties claiming an interest in the subject-matter may be before the court. And the like permission is granted to the state of Texas in respect of parties claiming under the state of Oklahoma or the United States.

(252 U. S. 444)

ASKREN, Atty. Gen. of New Mexico, et al. v. CONTINENTAL OIL CO. SAME v. SINCLAIR REFINING CO. SAME v. TEXAS CO.

(Argued Jan. 5 and 6, 1920. Decided April 19, 1920.)

Nos. 521-523.

1. COMMERCE  64, 72—STATE TAX ON SALES OF AND DEALERS IN GASOLINE VOID AS TO SALES IN ORIGINAL PACKAGES.

Laws N. M. 1919, c. 93, imposing an excise tax on sales of gasoline and a license tax on distributors and retail dealers therein, is void as imposing a burden upon interstate commerce, as applied to sales in the original barrels and packages in which the gasoline is shipped into the state, and sales to a single customer of the entire contents of the tank cars in which it is shipped into the state.

2. COMMERCE  64, 72—STATE TAX ON SALES OF AND DEALERS IN GASOLINE VALID AS TO SALES OTHER THAN IN ORIGINAL PACKAGES.

Laws N. M. 1919, c. 93, is valid as applied to gasoline sold from the tank cars, barrels, and packages in which it is shipped into the state in such quantities as the purchaser requires, though no gasoline is produced in New Mexico, and all gasoline sold therein is brought from other states; there being no discrimination against the products of other states.

Appeals from the District Court of the United States for the District of New Mexico.

Three suits, by the Continental Oil Company, by the Sinclair Refining Company, and by the Texas Company, against O. O. Askren, Attorney General of the State of New Mexico, and others. From orders granting temporary injunctions, defendants appeal. Affirmed.

\*445

\*Mr. A. B. Renahan, of Santa Fé, N. M., for appellants.

Messrs. Charles R. Brock, of Denver, Colo., and E. R. Wright, of Santa Fé, N. M., for appellees.

Mr. Justice DAY delivered the opinion of the Court.

These suits were brought by the three companies, appellees, in the District Court of

\*446

the United States for the District of New Mexico to enjoin the enforcement of an act of the Legislature of the state entitled:

"An act providing for an excise tax upon the sale or use of gasoline and for a license tax to be paid by distributors and retail dealers therein; providing for collection and application of such taxes; providing for the inspection of gasoline and making it unlawful to sell gasoline below a certain grade without notifying purchaser thereof; providing penalties for violations of this act and for other purposes."

The law is found in Session Laws of New Mexico 1919, c. 93, p. 182.

The cause came before three judges upon an application for temporary injunction and a counter motion to dismiss the bills of complaint. The temporary injunction was granted, and a direct appeal taken to this court.

The provisions of the act, so far as necessary to be considered, define a distributor of gasoline as meaning:

"Every person, corporation, firm, copartnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state."

A retail dealer is defined as meaning:

"A person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less."

Every distributor is required to pay an annual license tax of \$50 for each distributing station, or place of business, and agency. Every retail dealer is required to pay an annual license tax of \$5 for every place of business or agency. An excise tax is imposed upon the sale or use of gasoline sold or used in the state after July 1, 1919; such tax to be 2 cents per gallon on all gasoline so sold or used. Any distributor, or dealer, who shall fail to make return or statement as required in the act, or shall refuse, neglect or fail to pay the tax upon all sales or use of gasoline, or who shall make any false return or statement, or shall knowingly sell, distribute or use any gasoline without the tax

\*447

upon the sale or use thereof \*having been paid as provided in the act shall be deemed guilty of a misdemeanor, and punished by a fine and forfeiture of his license. It is made unlawful for any person (except tourists or travelers to the extent provided in the act) to use any gasoline not purchased from a licensed distributor or retail dealer without paying the tax of 2 cents per gallon. Inspectors are provided for each of the eight judicial districts of the state, who are required to see that the provisions of the act are enforced, and privileged to examine books and accounts of distributors and retail dealers, or warehousemen or others receiving and storing gasoline and of railroad and transportation companies, relating to purchases, receipts, shipments, or sales of gasoline; their salaries are provided, and salaries and expense bills are to be paid out of the state road fund. Any person who shall engage or continue in the business of selling gasoline without a license or after such license has been forfeited, or shall fail to render any statement, or make any false statement therein, or who shall violate any provision of the act the punishment for which has not been theretofore provided, shall be deemed guilty of a misdemeanor and



upon conviction shall be punished by a fine or imprisonment, or both. The state treasurer is required to set aside from the license fees and taxes collected under the provisions of the act a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections, and to place the balance to the credit of the state road fund, to be used for the construction, improvement and maintenance of public highways.

It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the state. Considering

\*448

\*its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasoline in the state of New Mexico.

The bills in the three cases are identical except as to the number of distributing stations alleged to belong to the companies respectively. As there was no answer, and the bills were considered upon application for injunction, and motion to dismiss, their allegations must be taken to be true.

Plaintiffs are engaged in the business of buying and selling gasoline and other petroleum products. The bills state that they purchase gasoline in the states of Colorado, California, Oklahoma, Texas and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bills describe two classes of business:

First, that they purchase in the states mentioned, or in some one of said states, gasoline, and ship it in tank cars from the state in which purchased into the state of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, they sell in tank cars the whole of the contents thereof to a single customer, before the package or packages, in which the gasoline was shipped have been broken. In the usual and regular course of their business they purchase gasoline in one of the states, other than the state of New Mexico, and ship it, so purchased from that state, in barrels and packages containing not less than two 5-gallon cans into the state of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages, containing the cans, it is their custom to sell the gasoline in the original packages and barrels. The gasoline is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributors of gasoline as the term is defined in the statute, and they are required to pay the sum of \$50 per annum

\*449

for each of their stations \*as an annual li-

cense tax for purchasing, shipping and selling gasoline as aforesaid.

A second method of dealing in gasoline is described in the bills: That the gasoline shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasoline from such tank cars, barrels and packages in such quantities as the purchaser requires.

[1] As to the gasoline brought into the state in the tank cars, or in the original packages and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the federal Constitution the importer of such products from another state into his own state for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

[2] The plaintiffs state in the bills that their business in part consists in selling gasoline in retail in quantities to suit purchasers. A business of this sort, although the gasoline was brought into the state in interstate commerce, is properly taxable by the laws of the state.

Much is made of the fact that New Mexico does not produce gasoline, and all of it that

\*450

is dealt in within that \*state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in, is not beyond the taxing power of the state. *W. F. Wagner & Sons v. City of Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. —, decided December 8, 1919, and the cases from this court cited therein.

Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is non-taxable, and at this preliminary stage of the

cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions, and its orders are

Affirmed.

(252 U. S. 563)

COMMONWEALTH OF PENNSYLVANIA  
v. STATE OF WEST VIRGINIA.

STATE OF OHIO v. STATE OF WEST  
VIRGINIA.

(Decided April 19, 1920.)

Nos. 23, 24.

Original suits by the Commonwealth of Pennsylvania against the State of West Virginia, and by the State of Ohio against the State of West Virginia. On motions for the appointment of a special master and commissioner and to consolidate the cases. Motions granted.

Messrs. W. I. Schaffer, of Chester, Pa., and Leo Weil, of Cleveland, Ohio, for Commonwealth of Pennsylvania.

Messrs. John G. Price and Freeman T. Eagleson, both of Columbus, Ohio, and R. G. Altizer, of Charleston, W. Va., for State of Ohio.

\*564

PER CURIAM. \*On consideration of the respective motions of the complainants for the appointment of a special master and of the defendant for the appointment of a commissioner to take the testimony and report the same to the court and of the motions to consolidate the cases for the purpose of taking such testimony.

It is now here ordered that the motions to consolidate the cases for the purpose of taking the proofs be, and the same are hereby granted.

It is further ordered that Mr. Levi Cooke, of the District of Columbia, be, and he is hereby, appointed a commissioner to take and return the testimony in these causes, with the powers of a master in chancery, as provided in the rules of this court; but said commissioner shall not make any findings of fact or state any conclusions of law.

It is further ordered that the complainants shall take their evidence, at such place or places as they may indicate, between the 1st day of May, 1920, and the 1st day of October, 1920, upon giving 10 days' notice of the time and place of taking such evidence to the counsel for the defendant; that the defendant may take evidence, at such place or places as it may indicate, between the 1st day of October, 1920, and the 1st day of March, 1921, upon giving 10 days' notice of the time and place of taking such evidence to the counsel for the complainants; that the complainants shall take their evidence in rebuttal between the 1st day of March, 1921, and the 1st day of April, 1921, at such place or places as they may indicate, upon giving 10 days' notice to counsel for defendant, and the defendant shall then conclude the tak-

ing of its evidence in surrebuttal on or before the 1st day of May, 1921, upon giving 10 days' notice of the time and place of taking such evidence to the counsel for complainants: Provided, however, that if complainants shall conclude the taking of their evidence in chief before

\*565

\*the 1st day of October, 1920, and shall give notice thereof, the time for the taking of evidence in chief on the part of defendant shall begin to run 15 days after the giving of said notice by the complainants; and if the defendant shall conclude the taking of its evidence before the 1st day of March, 1921, and shall give notice thereof, the 31 days' time for the taking of evidence in rebuttal on behalf of the complainants shall begin to run 15 days after the giving of said notice by the defendant, and the 30 days' time for the taking of evidence on behalf of defendant in surrebuttal shall begin to run from the termination of said 30 days allowed for the taking of the evidence in rebuttal by the complainants; but nothing in this proviso contained shall operate or be construed to postpone the ultimate dates for the commencement of the time for the taking of the defendant's evidence in chief, the complainants' evidence in rebuttal and the defendant's evidence in surrebuttal, respectively, first above specified.

It is further ordered that the said complainants and the defendant, respectively, shall make such deposits with the clerk of this court for fees, costs, and expenses of the said clerk and of the said commissioner as they may from time to time be requested by said clerk.

(252 U. S. 521)

ONEIDA NAVIGATION CORPORATION v.  
W. & S. JOB & CO., Inc.

THE PERCY R. PYNE, 2D.

(Argued and Submitted March 19, 1920. Decided April 19, 1920.)

No. 259.

1. APPEAL AND ERROR ⇨78(2)—DECREE DISMISSING PETITION TO BRING IN NEW DEFENDANT DOES NOT SUPPORT DIRECT APPEAL TO SUPREME COURT.

Where, in a libel for damages against a ship, the claimant denied liability and filed a petition to bring in another defendant claimed to be liable for the damages, a decree dismissing such petition was not appealable to the Supreme Court, under Judicial Code, § 238, as to direct appeals and writs of error, as there was no decree disposing of the case, as under such section decree must be both final and complete.

2. APPEAL AND ERROR ⇨23—WANT OF JURISDICTION CALLS FOR DISMISSAL ON COURT'S OWN MOTION.

Supreme Court will dismiss appeal for want of jurisdiction, though objection was not raised by appellee.

Appeal from the District Court of the United States for the Southern District of New York.



Libel in admiralty by James W. Smith and another against the sailing vessel Percy R. Pyne, 2d, etc., claimed by the Oneida Navigation Corporation, which brought in W. & S. Job & Co., Incorporated, as defendant. From a decree dismissing the claimant's petition to bring in such defendant, it appeals. Appeal dismissed.

Mr. George Whitefield Betts, Jr., of New York City, for appellant.

Mr. Peter S. Carter, of New York City, for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

James W. Smith and another libeled the schooner Percy R. Pyne, 2d, in the District Court of the United States for the Southern District of New York claiming damages for injury to cargo resulting from unseaworthiness due to the cutting away of timbers and frame for the installation of an auxiliary engine. The Oneida Navigation Company claimed the vessel as owner and answered denying liability. Then it filed, by leave of

\*522

court, a petition to bring in, under admiralty rule 15 of that court (29 Sup. Ct. xl) in analogy to admiralty rule 59 of this court (29 Sup. Ct. xlv), W. & S. Job & Co., Incorporated, as defendants, alleging them to be the party through whose fault, if any, the damages complained of had occurred, and that if liability should be established it would be entitled to be indemnified by them. W. & S. Job & Co., Incorporated, excepted to the petition and denied jurisdiction on the ground that the petition did not set forth a cause of action in admiralty. Their exception was sustained and the petition was dismissed on that ground. The case comes here by direct appeal, the District Judge having certified the question of jurisdiction.

[1, 2] The petition to make W. & S. Job & Co., Incorporated, party defendants was merely an incident in the progress of the case in the District Court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner had as claimant denied liability in its answer to the libel, and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Incorporated, was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under section 238 of the Judicial Code (Comp. St. § 1215), as under other sections, only from judgments which are both final and complete. *Collins v. Miller*, 252 U. S. 364, 40 Sup. Ct. 347, 64 L. Ed. —, decided by this court March 29, 1920; *Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443. The case

was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is

Dismissed for want of jurisdiction.

(252 U. S. 475)

HULL v. PHILADELPHIA & R. RY. CO.

(Argued Jan. 16, 1920. Decided April 19, 1920.)

No. 151.

1. MASTER AND SERVANT ⇐§§(1)—“EMPLOYÉ AND “EMPLOYED” IN LIABILITY ACT USED IN NATURAL SENSE.

The words “employé” and “employed” are used in the federal Employers’ Liability Act (Comp. St. §§ 8657–8665) in their natural sense, and describe the conventional relation of employer and employé.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Employed.]

2. MASTER AND SERVANT ⇐§§(6)—EMPLOYÉ OF RAILROAD HELD NOT TO BECOME EMPLOYÉ OF ANOTHER ROAD OVER WHOSE LINE HE RAN.

An agreement between connecting railroads, providing that each might run through trains over the other’s line, that each company would compensate the other for the use of its engines and crews on its own line, that each would furnish fuel and other supplies to its own engines and crews, and do or pay for its own engine cleaning and wiping, and be responsible for all accidents on its road, and might object to unsatisfactory employés of the other company running on its lines, etc., did not make an employé of one company, while running over the lines of the other, an employé of such other company within the federal Employers’ Liability Act (Comp. St. §§ 8657–8665).

Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the Court of Appeals of the State of Maryland.

Action by Elizabeth Hull, administratrix of John M. Hull, deceased, for the benefit of Elizabeth Hull, against the Philadelphia & Reading Railway Company. A judgment on a directed verdict for defendant was affirmed by the Court of Appeals of Maryland (132 Md. 540, 104 Atl. 274), and plaintiff brings certiorari. Affirmed.

Messrs. Charles D. Wagaman and Harvey R. Spessard, both of Hagerstown, Md., for petitioner.

Mr. Henry H. Keedy, Jr., of Hagerstown, Md., for respondent.

\*477

\*Mr. Justice PITNEY delivered the opinion of the Court.

This was an action brought in a state court of Maryland under the federal Employers’ Liability Act of April 22, 1908 (35 Stat. 65, c. 149 [Comp. St. §§ 8657–8665]), as

amended April 5, 1910 (36 Stat. 291, c. 143), by petitioner, as administratrix of John M. Hull, deceased, to recover damages because of his death, occurring, as alleged, while he was employed by defendant in interstate commerce. The trial court directed a verdict in favor of defendant, the Court of Appeals of Maryland affirmed the resulting judgment upon the ground that the deceased, at the time he was killed, was not in the employ of defendant within the meaning of the act of Congress (132 Md. 540, 104 Atl. 274), and upon this federal question the case is brought here by certiorari.

The pertinent facts are not in dispute. John M. Hull, at the time he was killed and for a long time before, was in the general employ of the Western Maryland Railway Company, an interstate carrier operating, among other lines, a railway from Hagerstown, Md., to Lurgan, Pa., at which point it connected with a railway owned and operated by defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford, in the same state. Through freight trains were operated from Hagerstown to Rutherford over these two lines, and Hull was employed as a brakeman on such a train at the time he received the fatal injuries. On the previous day a crew employed by the Western Maryland Railway Company, and of which he was a member, had taken a train hauled by a Western Maryland engine from Hagerstown to Rutherford, and at the time in question the same crew was returning with a train from Ruth-

\*478

erford \*to Hagerstown. Before starting they received instructions from the yardmaster at Rutherford (an employé of defendant company) as to the operation of the train, including directions to pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg, stopped there for the purpose of picking up the seven cars, and while this was being done Hull was run over and killed by one of defendant's locomotives.

The through freight service was conducted under a written agreement between the two railway companies, which was introduced in evidence and constitutes the chief reliance of petitioner. Its provisions, so far as they need to be quoted, are as follows:

"2. Freight trains to run through between Hagerstown and Rutherford in both directions and each company agrees to supply motive power in the above proportions [based upon mileage] so as to equalize the service performed.

\* \* \* \* \*

"4. Crews of each road to run through with their engines over the line of the other company.

"5. Each company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour:  
\* \* \* Time to begin at Rutherford and Hagerstown when crew is called for. \* \* \*  
Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown. \* \* \*

"6. The division of earnings of the traffic not

to be disturbed or in any way affected by this arrangement.

"7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

\* \* \* \* \*

"9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

\*479

"\*10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

\* \* \* \* \*

"16. Each company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs.

"17. Each company to have the right to object and to enforce objection to any unsatisfactory employé of the other running upon its lines.

"18. All cases of violation of rules or other derelictions by the employés of one company while upon the road of the other shall be promptly investigated by the owning company, and the result reported to the employing company, with or without suggestions for disciplining, the employing company to report to the other the action taken.

"19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

"20. Employés of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one company to the other in all such matters.

"21. The employés of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning company."

[1, 2] We hardly need repeat the statement made in *Robinson v. Balt. & Ohio R. R.*, 237 U. S. 84, 94, 35 Sup. Ct. 491, 59 L. Ed. 849, that in the *Employers' Liability Act* Congress used the words "employé" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employé. The simple question is

\*480

whether, under the \*facts as recited and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employé of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter



did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of coordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See *Standard Oil Co. v. Anderson*, 212 U. S. 215, 226, 29 Sup. Ct. 252, 53 L. Ed. 480.

*North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy.

The Court of Appeals of Maryland did not err in its disposition of the federal question, and hence its judgment is

Affirmed.

Mr. Justice CLARKE (dissenting). The Western Maryland Railroad Company owned a line of railroad extending from Hagerstown, Md., to Lurgan, where it connected

\*481

with the line of the Reading \*Company, extending to Rutherford, in Pennsylvania. The two companies entered into a contract by which through freight trains, made up and manned by crews primarily employed by either, should run through over the rails of the other company to Rutherford or Hagerstown, as the case might be. A crew from either line arriving at the terminus of the other should return with a train made up by the company operating the latter—together with any cars which might be "picked up" on the way.

Thus, for the purposes of operation, the line over which train crews worked was 81 miles in length, 34 miles of Western Maryland track and 47 miles of Reading track, and the relation of the men to the company, other than the one which originally employed them, while on its line, was defined by the contract quoted from in the opinion of the court.

Five of the paragraphs of this contract seem to me decisive of what that relation was, and of this case, viz.:

"5. Each company to pay the other an agreed compensation for the service of its engines and crews while on its line.

"10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents on its road.

"17. Each company to have the right to object to, and to enforce objection to, any unsatisfactory employé of the other running upon its lines.

"18. All violations of rules or other derelictions by employés of one company while on the road of the other shall be promptly investigated by the owning company and the result reported to the employing company, with or without suggestions for disciplining, the em-

ploying company to report to the other the action taken.

"21. The employés of each company while

\*482

upon the \*tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning company."

The deceased brakeman, Hull, was killed on the Reading tracks at Harrisburg 30 miles away from any Western Maryland track, by the alleged negligence of a Reading engineer, when engaged, under the direction of a local Reading yardmaster, in "picking up" cars to be added to a train which was made up by the Reading Company at Rutherford and dispatched by Reading officials from that terminal.

Thus, when he was killed, Hull was working on the Reading Railroad, subject to the "rules, regulations, discipline and orders" of the Reading Company and at the moment was acting under specific direction of a Reading yardmaster. The Reading Company was paying for the service which he was rendering when he was killed, it had authority to cause his discharge if his service was not satisfactory to it (paragraphs 17 and 18 of the contract, *supra*), and it had specifically contracted to be responsible for all damage to persons and property caused by accidents on its line growing out of the joint operation.

It is admitted that the service he was rendering was in the movement of interstate commerce, but upon the facts thus stated it is concluded in the opinion, that he was not within the scope of the act providing that—

"Every common carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death," etc. 35 Stat. c. 149, § 1, p. 65 (Comp. St. § 8657).

I cannot concur in this decision of the court for the reason that the case seems to me to be ruled by a conclusion as to the applicable law, stated in a strongly reasoned opinion in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, in this paragraph:

"One may be in the general service of another,

\*483

and, \*nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

By the contract of hiring Hull was in the general service of the Maryland Company, but "by his consent and acquiescence," he was transferred to the service of the Reading Company whenever his train passed on to its tracks. From that moment until his return to the Maryland Company's tracks again he was engaged exclusively in the work of the Reading Company, that company

paid for his services, he was under its "rules, regulations, discipline and orders," and it had authority to cause his discharge if his service was not satisfactory. He was under the control of that company as to what he was to do and as to the details of the manner of doing it as completely as if he had no other employer. He ceased for the time being to be the servant of the Maryland Company and became the servant of the Reading Company. 212 U. S. 215, 224, 29 Sup. Ct. 252, 53 L. Ed. 480.

The federal Employers' Liability Act does not require that a person shall be in the exclusive employ of a railroad common carrier in order to come within its scope. It provides that such carrier shall be "liable in damages to any person injured *while he is employed (engaged) by it in interstate commerce*," and it is impossible for me to accept the conclusion that Hull, when in the pay of the Reading Company, assisting in operating Reading interstate trains on Reading tracks, under the direction solely of Reading officials, general and local, was not "employed" by it in interstate commerce, within the meaning of this provision.

We are not dealing here with mere words or with merely "conventional relations," but with very serious realities. Enacted as the federal Employers' Liability Act was to bring the United States law up to the hu-

\*484

manitarian level \*of the laws of many of the states, by abolishing the unjust and irritating fellow servant rule, by modifying the often harsh contributory negligence rule, and by otherwise changing the common-law liability of interstate rail carriers to their employes, it should receive a liberal construction to promote its important purpose. Its terms invite the application of the rule, widely applied by other courts and clearly approved by this court, in the case cited, that a man may be in the general service of one, and also, with respect to a part of his service—to particular work—be in the service of another employer, so that he becomes for the time being the servant of the latter "with all the legal consequences of that relation." The line of demarcation could not be more clearly drawn than it was in this case, and the rule seems to me to be sharply and decisively applicable.

In the opinion of the court it is said:

"It is clear that each company retained control of its own train crews."

Upon the contrary, it seems to me, it is clear that neither company retained any control whatever over the crews primarily employed by it while they were on the line of the other company. "21. The employes of each company, while upon the tracks of the other, shall be subject to and conform to the rules, regulations, discipline and or-

ders of the owning company," was the contract between the two companies under which they were operating when Hull was negligently killed.

(252 U. S. 485)

UNITED STATES v. CHASE NAT. BANK.

(Argued Jan. 14 and 15, 1920. Decided April 19, 1920.)

(No. 134.)

BILLS AND NOTES  434—DRAWEE PAYING FORGED DRAFT NOT ENTITLED TO RECOVER PAYMENT, THOUGH INDORSEMENT WAS ALSO FORGED.

Where the United States paid a forged draft purporting to have been drawn on the United States Treasurer by an acting quartermaster in the army to his own order to a bank to which it had been indorsed, it could not recover the amount as paid under a mistake of fact, as the drawee is bound to know the drawer's signature, and the fact that the acting quartermaster's indorsement of the draft was also forged did not change the rule.

Mr. Justice Clarke dissenting.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Action by the United States against the Chase National Bank. A judgment for defendant on a directed verdict (241 Fed. 535) was affirmed by the Circuit Court of Appeals for the Second Circuit (250 Fed. 105, 162 C. C. A. 277), and plaintiff brings error. Affirmed.

Mr. Assistant Attorney General Spellacy, for the United States.

Messrs. Henry Root Stern, and Charles E. Rushmore, both of New York City, for defendant in error.

\*490

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error sued the defendant bank, at law, to recover money paid out under mistake of fact. The complaint alleged:

"First. That at all the times hereinafter mentioned, the plaintiff was and is a corporation sovereign, and the defendant was and is an association organized for and transacting the business of banking in the city, state, and Southern District of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided;

"Second. That on or about the 18th day of December, 1914, the defendant presented to the Treasurer of the United States at Washington, D. C., for payment, a draft in the sum of \$3,571.47, drawn on the Treasurer of the United States, payable to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., and purporting to be drawn by E. V. Sumner, Acting Quartermaster, U. S. A., and to be endorsed by E. V. Sumner,



\*491

2d Lt., 2d Cav., A. Q. M., the \*Howard National Bank, and the defendant; a copy of said draft and the indorsements on the back thereof is hereto attached and marked Exhibit A,<sup>1</sup> and made a part hereof;

\*492

\*"Third. That at the date of the presentation of said draft by the defendant to the Treasurer of the United States, the defendant was a depository of the funds of the United States of America, and payment of said draft to the defendant was thereupon made by the plaintiff, by passing a credit for the amount of said draft to the defendant upon the accounts of the defendant, as depository for the funds of the plaintiff;

"Fourth. That the name of said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., indorsed upon the back of said draft, was forged and had been wrongfully and fraudulently written upon the same by a person other than the said E. V. Sumner, without his knowledge or consent, and no part of the proceeds of said draft were ever received by him;

"Fifth. That the payment of said draft made by the plaintiff to the defendant, as described in paragraph three of this complaint, was made under a mistake of fact and without knowledge that the signature of the said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., payee thereof, had been forged upon the back of said draft;

"Sixth. That the plaintiff has duly requested the defendant to repay to it the amount of said draft, to wit, \$3,571.47, but the defendant has failed and refused to pay the same or any part thereof to the plaintiff.

"Wherefore, the plaintiff demands judgment against the defendant in the sum of \$3,571.47, with interest thereon from the 18th day of December, 1914, together with the costs and disbursements of this action."

<sup>1</sup> Exhibit A: [Face.]

|                                                            |                                      |
|------------------------------------------------------------|--------------------------------------|
| Office of the Quartermaster.<br>Fort Ethan Allen, Vermont. | December<br>15, 1914.                |
| War<br>Quartermaster<br>Treasur Amer<br>(Shield)           | 444                                  |
| Septent Sigil.                                             | Treasurer of the United States 15-51 |

Pay to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., \$3571.47, thirty-five hundred seventy-one & 47/100 dollars.

Object for which drawn: Vo. No. Cash transfers.  
E. V. Sumner,  
Acting Quartermaster, U.S.A. 21739.

[Back.]

Form Approved by the Comptroller of the Treasury  
January 27, 1913.

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

E. V. Sumner,  
(Sign on this line)  
2d Lt., 2 Cav., AQM.

Pay Chase National Bank New York, or order. Restrictive indorsements guaranteed. Howard Nat'l Bank, 58-3 Burlington, Vt. 58-3, M. T. Rutter, Cashier.

Received payment from the Treasurer of the United States Dec. 16, 1914. 1-74 The Chase National Bank 1-74 of the City of New York.

The bank denied liability and among other things claimed that the same person wrote the name E. V. Sumner upon the draft both as drawer and indorser. The facts were stipulated.

It appears: Lieutenant Sumner, quartermaster and disbursing officer at Ft. Ethan Allen, near Burlington, Vt., had authority to draw on the United States Treasurer. Sergeant Howard was his finance clerk and so

\*493

\*known at the Howard National Bank of Burlington. Utilizing the official blank form, Howard manufactured in toto the draft in question—Exhibit A. Having forged Lieutenant Sumner's name both as drawer and indorser, he cashed the instrument over the counter at the Howard National Bank without adding his own name. That bank immediately indorsed and forwarded it for collection and credit to the defendant at New York City; the latter promptly presented it to the drawee (the Treasurer), received payment and credited the proceeds as directed. Two weeks thereafter the Treasurer discovered the forgery and at once demanded repayment which was refused. Before discovery of the forgery the Howard National Bank withdrew from the Chase National Bank sums aggregating more than its total balance immediately after such proceeds were credited; but additional subsequent credit items had maintained its balance continuously above the amount of the draft.

Both sides asked for an instructed verdict without more. The trial court directed one for the defendant (241 Fed. 535) and judgment thereon was affirmed by the Circuit Court of Appeals (250 Fed. 105, 162 C. C. A. 277). If important, the record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to defendant, contributed to success of the forgery. *Williams v. Vreeland*, 250 U. S. 295, 298, 39 Sup. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038.

The complaint placed the demand for recovery solely upon the forged indorsement—neither negligence nor bad faith is set up. If the draft had been a valid instrument with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake. *Hortsman v. Henshaw*, 11 How. 177, 183, 13 L. Ed. 653. But here the whole instrument was forged, never valid, and nobody had better right to it than the collecting bank.

\*494

\**Price v. Neal* (1762) 3 Burrows, 1354, 1357, held that it is incumbent on the drawee to know the drawer's hand and that if the former pay a draft upon the latter's forged name to an innocent holder not chargeable with fault there can be no recovery. "The plaintiff cannot recover the money unless it be against conscience in the defendant to re-

tain it." "But it can never be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration which he had bona fide paid without the least privity or suspicion of any forgery." And the doctrine so announced has been approved and adopted by this court. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 348, 6 L. Ed. 334; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, 192, 20 L. Ed. 366; *Leather Mfgs. Bank v. Morgan*, 117 U. S. 96, 109, 6 Sup. Ct. 657, 29 L. Ed. 811; *United States v. Natl. Exch. Bank*, 214 U. S. 302, 311, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184.

In *Bank of United States v. Bank of Georgia*, through Mr. Justice Story, this court said concerning *Price v. Neal*:

"There were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said 'here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but

\*495

it was not incumbent upon the defendant \*to inquire into it. There was a notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up; the other bill he actually accepts, after which, the defendant, innocently and bona fide, discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was

any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.' The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretense to allege, that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Price v. Neal* has never since been departed from; and, in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Does the mere fact that the name of Lieutenant Sumner was forged as indorser as well as drawer prevent application here of the established rule? We think not. In order to recover plaintiff must show that the defendant cannot retain the money with good

\*496

conscience. Both are \*innocent of intentional fault. The drawee failed to detect the forged signature of the drawer. The forged indorsement puts him in no worse position than he would occupy if that were genuine. He cannot be called upon to pay again and the collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank who had full right to act upon the assumption that the former knew the drawer's signature or at least took the risk of a mistake concerning it. *Bank of England v. Vagliano Bros.*, [1891] L. R. App. Cases, 107; *Dedham Bank v. Everett Bank*, 177 Mass. 392, 395, 59 N. E. 62, 83 Am. St. Rep. 286; *Deposit Bank v. Fayette Bank*, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; *National Park Bank v. Fourth National Bank*, 46 N. Y. 77, 80, 7 Am. Rep. 310; *Howard v. Bank*, 28 La. Ann. 727, 26 Am. Rep. 105; *First National Bank v. State Bank*, 107 Iowa, 327, 77 N. W. 1045, 44 L. R. A. 131; *Bank v. Trust Co.*, 168 N. C. 606, 85 S. E. 5, L. R. A. 1915D, 1138; 4 *Harvard Law Review*, 297, article by Prof. Ames. And see *Cooke v. United States*, 91 U. S. 389, 396, 23 L. Ed. 237.

The judgment of the court below is Affirmed.

Mr. Justice CLARKE dissents.



(252 U. S. 465)

## UNITED STATES v. SIMPSON.

(Submitted March 5, 1920. Decided April 19, 1920.)

No. 444.

INTOXICATING LIQUORS  138—INTERSTATE TRANSPORTATION BY OWNER FOR HIS OWN USE BY HIS OWN AUTOMOBILE FORBIDDEN BY STATUTE.

Act March 3, 1917, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), prohibiting the transportation of intoxicating liquors in interstate commerce, except for specified purposes, into any state where the manufacture or sale of such liquors for beverage purposes is punishable, applies to the interstate transportation of liquor by its owner in his own automobile and for his own personal use.

Mr. Justice Clarke, dissenting.

In Error to the District Court of the United States for the District of Colorado.

Everett L. Simpson was indicted for an offense, and a demurrer to the indictment was sustained (257 Fed. 860), and the United States brings error. Reversed.

Mr. Assistant Attorney General Frierson, for the United States.

\*466

\*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an indictment under section 5 of the Act of March 3, 1917, known as the Reed Amendment (39 Stat. 1069, c. 162 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a]) which declares that—

"Whoever shall \* \* \* cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state \* \* \* the laws of which \* \* \* prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc.

And the question for decision is whether the statute was applicable where the liquor—five quarts of whisky—was transported by its owner in his own automobile and was for his personal use and not for an excepted purpose. The District Court answered the question in the negative and on that ground sustained a demurrer to the third count, which is all that is here in question and discharged the accused. 257 Fed. 860.

We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition state from another state for purposes other than those specially excepted—a matter which Congress could and the states could not control. *Danciger v. Cooley*, 248 U. S. 319, 323, 39 Sup. Ct. 119, 63 L. Ed. 266.

The introduction could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce. *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; *United States v. Chavez*, 228 U. S. 525, 532, 533, 33 Sup. Ct. 595, 57 L. Ed. 950; *United States v. Mesa*, 228 U. S. 533, 33 Sup. Ct. 597, 57 L. Ed. 953; *Pipe Line Cases*, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. Ed. 1459; *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337. The statute makes no distinction between different modes of transportation and we think it was in-

\*467

tended to include them all, that being \*the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, autotrucks and other private vehicles that it would not be of much practical benefit. See *Kirmeyer v. Kansas*, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. Ed. 721. At all events we perceive no reason for rejecting the natural import of its words and holdings that it was confined to transportation for hire or by public carriers.

The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases where the transportation was personal and private, as here. *Ex parte Westbrook* (D. C.) 250 Fed. 636; *Malcolm v. United States*, 256 Fed. 363, 167 C. C. A. 533; *Jones v. United States* (C. C. A.) 259 Fed. 104; *Berryman v. United States* (C. C. A.) 259 Fed. 208.

That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in *United States v. Hill*, supra.

We conclude that the District Court erred in construing the statute and sustaining the demurrer.

Judgment reversed.

Mr. Justice CLARKE (dissenting.) The indictment in this case charges that the defendant, being in the City of Cheyenne, Wyoming, "bought, paid for and owned" five quarts of whisky and thereafter, in his own automobile, driven by himself, transported it into the City of Denver, Colorado, intending to there devote it to his own personal

\*468

use. Colorado prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The court decides that this liquor was unlawfully "transported in interstate commerce," from Wyoming into Colo-

rado within the meaning of the Act of Congress of March 3, 1917 (39 Stat. 1069).

With this conclusion I cannot agree.

By early (*Gibbons v. Ogden*, 9 Wheat. 1, 193, 6 L. Ed. 23) and by recent decisions (*Second Employers' Liability Cases*, 223 U. S. 1, 46, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44) of this court and by the latest authoritative dictionaries, interstate commerce, in the constitutional sense, is defined to mean commercial, business, intercourse—including the transportation of passengers and property—carried on between the inhabitants of two or more of the United States,—especially (we are dealing here with property) the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different states. The liquor involved in this case, after it was purchased and while it was being held for the personal use of the defendant, was, certainly, withdrawn from trade or commerce as thus defined—it was no longer in the channels of commerce, of trade or of business of any kind—and when it was carried by its owner, for his personal use, across a state line, in my judgment it was not moved or transported in interstate commerce, within the scope of the Act of Congress relied upon or of any legislation which Congress had the constitutional power to enact with respect to it at the time the Reed Amendment was approved. The grant of power to Congress is over Commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use.

I think the Hill Case, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337, was wrongly decided and that the judgment of the District Court in this case should be affirmed.

(252 U. S. 499)

MUNDAY et al. v. WISCONSIN TRUST CO.  
et al.

(Argued and Submitted March 25, 1920.  
Decided April 19, 1920.)

No. 288.

1. COURTS  $\S$ 366(7)—WHETHER STATUTE VALIDATED CONTRACT OF FOREIGN CORPORATION A QUESTION OF STATE LAW.

Whether St. Wis. 1911,  $\S$  1770j, as amended by Laws 1917, c. 211, validating attempts by foreign corporations to acquire legal title to land before filing their charters, etc., as required by statute, validated a particular contract theretofore unenforceable, was a question for the state court finally to decide, and involved no right under the Constitution or laws of the United States, and no impairment of any federal right resulted from the state court's decision that such contract was not validated.

2. CONSTITUTIONAL LAW  $\S$ 129—STATUTE RESPECTING FOREIGN CORPORATIONS DOES NOT IMPAIR CONTRACT RIGHTS AS TO SUBSEQUENT TRANSACTIONS.

St. Wis. 1911,  $\S$  1770b, subsecs. 2, 10, forbidding foreign corporations to transact business or acquire property in the state, without filing copies of their charters, etc., and declaring contracts relating to property before compliance therewith void, does not violate the contract clause of the federal Constitution (article 1,  $\S$  10), as applied to deeds executed to foreign corporations subsequent to its enactment.

3. CONSTITUTIONAL LAW  $\S$ 276—STATUTE INVALIDATING CONTRACTS WITH FOREIGN CORPORATIONS HELD NOT TO DENY DUE PROCESS.

St. Wis. 1911,  $\S$  1770b, subsec. 10, declaring void contracts relating to property within the state made by foreign corporations which have not filed copies of their charters, etc., does not conflict with the due process clause of Const. U. S. Amend. 14, as applied to deeds to a foreign corporation covering land in Wisconsin; though the contract and the deeds were made in another state.

In Error to the Supreme Court of the State of Wisconsin.

Action by the Wisconsin Trust Company and another against C. B. Munday, trustee, and others. A judgment for plaintiffs was affirmed by the Wisconsin Supreme Court (168 Wis. 31, 168 N. W. 393, 169 N. W. 612), and defendants bring error. Affirmed.

Messrs. Walker Bachrach and Hamilton Moses, both of Chicago, Ill., for plaintiffs in error.

Messrs. William E. Black, of Milwaukee, Wis., and John B. Simmons, of Racine, Wis., for defendants in error.

\*501

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The court below declared null and void two separate deeds whereby defendants in error undertook to convey to the Realty Realization Company, a Maine corporation, certain land in Wisconsin upon the ground that the grantee had failed to comply with the statute of the state prescribing conditions under which foreign corporations might acquire title to property therein. The deeds were dated and delivered in Illinois February 28, 1913. A subsequent deed from the Realty Company and a mortgage by its grantee were also declared ineffective, but they need not be separately considered here. Wisconsin Trust Co. v. Munday, 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

At the time of the transactions in question the applicable statutory provisions concerning foreign corporations were subsections 2 and 10 of section 1770b, Wisconsin Statutes 1911, which follow:

"Sec. 1770b. 2. No corporation, incorporated or organized otherwise than under the laws of



this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized. \* \* \*

"Sec. 1770b. 10. Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall

\*502

have complied with the provisions \*of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

The original proceeding was instituted March 30, 1913. While it was pending in the circuit court the Realty Company complied with section 1770b and obtained a license to do business and hold property in Wisconsin—October, 1915. On May 11, 1917, the Legislature enacted Chapter 211, Laws of 1917, which amended subsection 1 of section 1770j of the statute to read:

"Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770b of the statutes, and which is now not required to comply with said section or which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed."

Plaintiffs in error unsuccessfully challenged the validity of section 1770b upon the ground of conflict with the contract clause, section 10, article 1, of the federal Constitution and the due process clause of the Fourteenth Amendment. They further insisted that if section 1770j as amended by chapter 211, Laws of 1917, was not so applied as to validate the deeds in question, rights, privileges, and immunities guaranteed to them by the Fourteenth Amendment would be infringed.

[1] Obviously, no impairment of any federal right resulted from the construction placed upon section 1770j as amended in 1917. Whether that section did or did not validate a contract theretofore unenforceable was a

\*503

question for the \*state court finally to decide—it involved no right under the Constitution or laws of the United States.

[2] Section 1770b was enacted prior to the transactions here in question and the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639, 32 Sup. Ct. 577, 56 L. Ed. 924.

[3] In support of the claim that subsection 10, section 1770b as construed by the court below conflicts with the due process clause it is said:

"The contract between the defendants in error and the Realty Company and the deeds delivered in compliance therewith were all made in Illinois. They have been declared void in the state of Wisconsin. So applied the statute deprives plaintiffs in error of their property without due process of law."

*Allgeyer v. Louisiana*, 165 U. S. 578, 591, 17 Sup. Ct. 427, 41 L. Ed. 832, is relied upon as adequate authority to support the point presented; but we think it is wholly irrelevant.

Where interstate commerce is not directly affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. *Fritts v. Palmer*, 132 U. S. 282, 288, 10 Sup. Ct. 93, 33 L. Ed. 317; *Chattanooga National Building & Loan Association v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 568, 36 Sup. Ct. 168, 60 L. Ed. 439.

No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared:

"The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate." *United States v. Crosby*, 7 Cranch, 115, 116, 3 L. Ed. 287.

The judgment of the court below is Affirmed.

(252 U. S. 547)

(40 Sup.Ct.)

## SIMPSON et al. v. UNITED STATES.

(Argued March 17 and 18, 1920. Decided April 19, 1920.)

No. 213.

## 1. EVIDENCE ¶11—JUDICIAL NOTICE TAKEN OF FAIR EARNING POWER OF MONEY SAFELY INVESTED.

The court takes judicial notice that in 1901, when a tax on a life interest in personal property was collected, under the War Revenue Act of 1898, 4 per cent. was generally assumed to be the fair value or earning power of money safely invested.

## 2. INTERNAL REVENUE ¶25—MORTUARY TABLES PROPERLY USED IN COMPUTING VALUE OF LIFE INTEREST IN PERSONALTY.

It was not illegal, in assessing a tax under the War Revenue Act of 1898, on legacies, giving personal property to the testator's daughters for life, to use mortuary tables showing the present worth of life interests in personal property.

## 3. INTERNAL REVENUE ¶36—"LEGACIES VESTED IN POSSESSION AND ENJOYMENT" WHEN EXECUTRIX HAD MONEY TO PAY THEM, SO AS TO PREVENT REFUND OF TAX.

Under Code Civ. Proc. N. Y. 1899, § 2721, requiring executors to discharge legacies after one year, if there be assets, section 2722, giving legatees a right to compel payment, and section 2718, requiring the publication of notice to creditors and making executors not chargeable for assets paid to legatees, where creditors' claims are not presented, where executors prior to July 1, 1902, had abundant assets with which to pay certain legacies, the legacies were vested in possession and enjoyment, within Act June 27, 1902, requiring the refund of taxes collected on contingent beneficial interest not vested prior to July 1, 1902.

## 4. INTERNAL REVENUE ¶38—IN SUIT FOR REFUND OF LEGACY TAX, SHOWING OF OBSTACLE TO SETTLEMENT OF ESTATE HELD INSUFFICIENT.

In a suit, under Act June 27, 1902, for refund of a tax assessed on legacies under War Revenue Act 1898, an obstacle to the settlement of the estate, preventing a vesting of the legacies prior to July 1, 1902, was not established by showing that a suit was pending against a partnership of which deceased was a member for an accounting without showing the pleadings, issues, the character of the suit, the amount or merit of the claim, or the result of the litigation.

Appeal from the Court of Claims.

Suit by John W. Simpson and others, as executors of John G. Moore, deceased, against the United States. From a judgment dismissing the amended petition (53 Ct. Cl. 640), the claimants appeal. Affirmed.

\*548

\*Mr. Thomas M. Day, of New York City, for appellants.

Mr. Solicitor General King, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit to recover the whole, or, failing that, a large part of a succession tax assessed under the Spanish War Revenue Act of June 13, 1898 (30 Stat. 448), and paid by the appellants, as executors of the will of John G. Moore, deceased, a citizen of New York, who died in June, 1899.

\*549

\*The assessment was made against the appellants as persons having in charge or trust, as executors, legacies arising from personal property, and the contention is that right to recovery may be derived either from the Act of Congress approved July 27, 1912 (37 Stat. 240), directing the Secretary of the Treasury to refund the amount of any claims which should be satisfactorily shown to have been "erroneously or illegally" assessed under warrant of section 29 of the War Revenue Act, or from the Act approved June 27, 1902 (32 Stat. 406), which directs the Secretary of the Treasury to refund to executors so much of any tax as may have been collected under warrant of that act "on contingent beneficial interests which shall not have been vested prior to July 1, 1902."

The decedent in his will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in trust to invest and reinvest and to pay to each of his two daughters the whole of the net income of one share so long as she should live.

Pursuant to authority derived from section 31 of the War Revenue Act and R. S. §§ 321 and 3182 (Comp. St. §§ 492, 5904), the Commissioner of Internal Revenue, in order to provide for the determination of the amount of taxes to be assessed on legacies such as are here involved, on December 16, 1898, issued instructions to collectors of internal revenue throughout the country, which contained tables showing the present worth of life interests in personal property, with directions for computing the tax upon the same. These tables were based on "Actuaries'" or "Combined Experience Tables," and were used in arriving at the amounts paid in this case.

On June 30, 1899, letters testamentary were issued to appellants as executors, and on April 1, 1901, the United States Commissioner of Internal Revenue, pursuant to the provisions of section 29 of the Spanish War Revenue Act, as

\*550

assessed a tax of about \$12,000 on the share of each daughter, which was paid on April 15, 1901.

On October 29, 1907, appellants presented to the government their claim, which was rejected, for the refund of \$21,640.55 of the taxes so paid, "or such greater amount there-



of as the Commissioner might find refundable under the Refunding Act of June 27, 1902, or other remedial statutes."

The judgment of the Court of Claims, dismissing the amended petition as to the claims for refund of the tax paid on the legacies of the two daughters, and on three small legacies which will follow the disposition of these, and need no further notice, is before us for review.

Of the two claims of error argued, the first is that the Court of Claims erred in refusing to hold that it was illegal to use mortuary tables and to assume 4 per cent. as the value of money in computing the tax that was paid, and that, therefore, the whole amount of it should be refunded.

[1, 2] The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1889 by courts, Legislatures, and insurance companies for the purpose of determining the present value of future contingent interests in property, and we take judicial notice of the fact that at the time this tax was collected 4 per cent. was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton v. Moore*, 178 U. S. 41, 44, 20 Sup. Ct. 747, 44 L. Ed. 969, *United States v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137, *Rand et al. v. United States*, 249 U. S. 503, 506, 39 Sup. Ct. 359, 63 L. Ed. 731, and in *Henry, Executor, v. United States*, 251 U. S. 393, 40 Sup. Ct. 185, 64 L. Ed. —, decided at this term. It is much too late to successfully assail a method so generally ap-

\*551

\*plied, and as to this claim of error the judgment of the Court of Claims is affirmed.

[3] The facts following are essential to the disposition of the remaining question. The appellant executors appointed a trust company trustee for the two daughters of decedent and prior to July 1, 1902, they paid to it, in trust for each of them the sum of \$426,086.08. After making these payments the executors had in their custody in cash and securities in excess of \$1,797,000, from which, prior to March 16, 1906, they made further payments, amounting approximately to \$500,000 to the trust fund for each of the daughters, thereby making each of them exceed \$926,000. The assessment of each was \$665,000 in April, 1901.

The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that

date, within the meaning of the Act of June 27, 1902 (32 Stat. 406, § 3), and that it should therefore be refunded.

The law of New York, in force when the estate was in process of administration, provided (New York Code of Civil Procedure, 1899, § 2721) that "after the expiration of one year [from the time of granting letters testamentary] the executors \* \* \* must discharge all specific legacies bequeathed by the will and pay general legacies, if there be assets," and section 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.

Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing.

\*552

\*The state law also authorized (section 2718) the executors to publish a notice once in each week for six months, requiring all creditors to present their claims against the estate, and provided that in suits brought on any claim not presented within six months from the first publication of such notice, the executors should not be chargeable for any assets which they may have paid out in satisfaction of legacies.

The appellants first published the notice to creditors on April 25, 1900, and therefore they might safely have made payment on the daughters' legacies after the 1st of November, 1900, one year and eight months prior to July 1, 1902, unless cause to the contrary was shown.

[4] The only excuse given in the record for not complying with this state law is that in March, 1902, a stockholders' suit was commenced against the partnership of Moore & Schley, of which the deceased was a member, in which an accounting was sought for a large amount of promotion profits in connection with the organization of the American Malt Company. As to this the Court of Claims finds that the evidence does not show the pleadings, issues or the character of the suit, or the amount or merit of the claim, or the result of the litigation. Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets.

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than

was necessary to make them equal to, and greater than that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was

\*553

thus the legal \*duty of the executors to pay before July 1, 1902, and for compelling payment of which statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the Act of June 27, 1902, as it was interpreted in *United States v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137, *McCoach v. Pratt*, 236 U. S. 562, 567, 35 Sup. Ct. 421, 59 L. Ed. 720, and in *Henry, Ex'r, v. United States*, decided February 2, 1920. The case would be one for an increased assessment, rather than for a refund, if the War Revenue Act had not been repealed.

Affirmed.

Mr. Justice McREYNOLDS did not participate in the discussion or decision of this case.

(252 U. S. 469)

HOUSTON, Secretary of the Treasury, et al.  
v. ORMES.

(Argued Jan. 23, 1920. Decided April 19, 1920.)

No. 86.

1. UNITED STATES  $\S$ 118—PAYMENT OF MONEY APPROPRIATED FOR PAYMENT OF CLAIM IS MINISTERIAL ACT.

Where a fund has been appropriated by Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, the Treasury officials are charged with the ministerial duty to make payment on demand to the person designated.

2. UNITED STATES  $\S$ 125—SUIT TO ESTABLISH ATTORNEY'S LIEN ON A FUND APPROPRIATED NOT A SUIT AGAINST THE UNITED STATES.

Where Congress appropriated money for the payment of a claim allowed by the Court of Claims, a suit against the claimant and the Treasury officials to establish an equitable lien for attorney's fees on the fund, in which a receiver was appointed to collect and receive the fund, was not a suit against the United States.

3. UNITED STATES  $\S$ 111—STATUTE DOES NOT PREVENT GIVING EFFECT TO ASSIGNMENT BY OPERATION OF LAW OF ALLOWED CLAIM.

Rev. St.  $\S$  3477 (Comp. St.  $\S$  6383), regulating the assignment of claims against the United States, does not prevent giving effect to an assignment by operation of law after the claim has been allowed.

4. APPEARANCE  $\S$ 23—SITUS OF DEBT AS AFFECTING JURISDICTION IS IMMATERIAL, WHERE CREDITOR APPEARED IN SUIT.

Whether a debt due from the United States to a claimant, for the payment of whose claim Congress had made an appropriation, had a situs in the District of Columbia, was immaterial on the question of whether a suit to establish an equitable lien for attorney's fees on the fund was within the jurisdiction of the courts of the District, where claimant voluntarily appeared and answered the bill without objection, and jurisdiction did not depend upon publication of process against her as a nonresident, under Code of Laws D. C. 1901,  $\S$  105.

Appeal from the Court of Appeals of the District of Columbia.

Suit by De Forest L. Ormes, administrator of Belva A. Lockwood, deceased, against David F. Houston, Secretary of the Treasury, John Burke, Treasurer of the United States, and another. A decree in favor of plaintiff was affirmed by the Court of Appeals of the District of Columbia (*McAdoo v. Ormes*, 47 App. D. C. 364), and the defendants named appeal. Affirmed.

Mr. Solicitor General King, for appellants.

Miss Mary O'Toole, of Washington, D. C., for appellee.

\*471

\*Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity, brought by the late Belva A. Lockwood in her lifetime in the Supreme Court of the District of Columbia, to establish an equitable lien for attorney's fees upon a fund of \$1,200 in the treasury of the United States, appropriated by Congress (Act of March 4, 1915, c. 140, 38 Stat. 962, 981) to pay a claim found by the Court of Claims to be due to one Susan Sanders, who was made defendant together with the Secretary of the Treasury and the Treasurer of the United States. There were appropriate prayers for relief by injunction and the appointment of a receiver. Defendant Sanders voluntarily appeared and answered, denying her indebtedness to plaintiff; the other defendants answered, admitting the existence of the fund, and declaring that as a matter of comity and out of deference to the court it would be retained under their control to await the final disposition of the case, but objecting to the jurisdiction of the court over the cause upon the ground that debts due from the United States have no situs in the District of Columbia, that there was nothing to show that either the United States or the defendant Sanders had elected to make the sum alleged to be due from the United States payable to her in the District, and that in the absence of personal service upon her the court could make no decree that would protect the United States. There

\*472

was a final decree adjudging that \*the sum



of \$90 was due from the defendant Sanders to Mrs. Lockwood, with costs, and appointing a receiver to collect and receive from the Secretary of the Treasury the \$1,200 appropriated in favor of Sanders, directing the Secretary to pay the latter sum to the receiver, and decreeing that his receipt should be a full acquittance to the United States for any and all claims and demands of the parties arising out of or connected with said claim. The Secretary of the Treasury and the Treasurer appealed to the Court of Appeals of the District of Columbia; the defendant Sanders not appealing. That court affirmed the decree (*McAdoo v. Ormes*, 47 App. D. C. 364), and a further appeal, taken by the officials of the Treasury under section 250, Judicial Code (Comp. St. § 1227), brings the case here.

[1, 2] The principal contention is that, because the object of the suit and the effect of the decree were to control the action of the appellants in the performance of their official duties, the suit was in effect one against the United States. But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government. So it has been declared by this court in many cases relating to state officers. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Louisiana v. Jumel*, 107 U. S. 711, 727, 2 Sup. Ct. 128, 27 L. Ed. 448; *In re Ayers*, 123 U. S. 443, 506, 8 Sup. Ct. 164, 31 L. Ed. 216. In *Minnesota v. Hitchcock*, 185 U. S. 373, 386, 22 Sup. Ct. 650, 655 (46 L. Ed. 954), while holding that a suit against officers of the United States might be in effect a suit against the United States, the court said:

"Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in ap-

\*473

propriate \*form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its consent, nor within the rule established in the *Ayers Case*."

And in *Parish v. MacVeagh*, 214 U. S. 124, 29 Sup. Ct. 556, 53 L. Ed. 936, the court upheld the right of a claimant, in whose favor an appropriation had been made by Congress, to have a mandamus against the Secretary of the Treasury requiring him to pay the claim. To the same effect, *Roberts, Treasurer, v. United States*, 176 U. S. 221, 231, 20 Sup. Ct. 376, 44 L. Ed. 443.

In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership which is its equivalent, making Sanders a party so as to bind her and so that the decree may afford a proper acquittance to the government. The practice of bringing suits in equity for this purpose is well established in the courts of the District. *Sanborn v. Maxwell*, 18 App. D. C. 245; *Roberts v. Consaul*, 24 App. D. C. 551, 562; *Jones v. Rutherford*, 26 App. D. C. 114; *Parish v. McGowan*, 39 App. D. C. 184, s. c. on appeal *McGowan v. Parish*, 237 U. S. 285, 295, 35 Sup. Ct. 543, 59 L. Ed. 955. Confined, as it necessarily must be, to cases where the officials of the government have only a ministerial duty to perform, and one in which the party complainant has a particular interest, the practice is a convenient one, well supported by both principle and precedent.

[3] Section 3477, Rev. Stat. (Comp. St. § 6383), regulating the assignment of claims against the United States, is not an obstacle. As has been held many times, the object of

\*474

Congress in this legis\*lation was to protect the government, not the claimant; and it does not stand in the way of giving effect to an assignment by operation of law after the claim has been allowed. *Erwin v. United States*, 97 U. S. 392, 397, 24 L. Ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. Ed. 229; *Price v. Forrest*, 173 U. S. 410, 423-425, 19 Sup. Ct. 434, 43 L. Ed. 749.

In support of the contention that a court of equity may not control the action of an officer of the United States within the scope of his authority, *Wells v. Roper*, 246 U. S. 335, 38 Sup. Ct. 317, 62 L. Ed. 755, is cited; but it is not in point. The official duty sought to be subjected to control in that case was not ministerial, but required an exercise of official discretion, as the opinion shows. 246 U. S. 338, 38 Sup. Ct. 317, 62 L. Ed. 755.

[4] It is further objected that debts due from the United States have no situs at the seat of government, and *Vaughan v. Northup*, 15 Pet. 1, 6, 10 L. Ed. 639, *Mackey v. Cox*, 18 How. 100, 105, 15 L. Ed. 299, and *Wyman v. Halstead*, 109 U. S. 654, 657, 3 Sup. Ct. 417, 27 L. Ed. 1068, are cited. But in the present case the question of situs is not material. If the jurisdiction as to the defendant Sanders had depended upon publication of process against her as a nonresident under section 105 of the District Code (Act of March 3, 1901, c. 854, 31 Stat. 1189, 1206), upon the theory that her claim against the

government was "property within the District," the point would require consideration. But the jurisdiction over her rests upon her having voluntarily appeared and answered the bill without objection. Hence there is no question that the decree binds her, and so constitutes a good acquittance to the United States as against her.

The decree will be

Affirmed.

(252 U. S. 411)

# KENNEY v. SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE.

(Argued March 23, 1920. Decided April 19, 1920.)

Nos. 269 and 303.

## 1. JUDGMENT 926—STATUTE DENYING COURTS JURISDICTION OF ACTIONS ON FOREIGN JUDGMENTS FOR DEATH INVALID.

A state statute prohibiting actions for death occurring in other states, construed as depriving the courts of the state of jurisdiction of an action on a judgment obtained in another state on a cause of action for death, violates Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the judicial proceedings of other states.

## 2. COURTS 366(23)—CONSTRUCTION OF STATUTE OF STATE A QUESTION FOR THE STATE COURTS.

Whether an Illinois statute prohibiting actions for death occurring in other states should be construed as permitting actions on judgments rendered in other states on causes of action for death was a question for the Supreme Court of the state to decide.

## 3. DEATH 35—STATUTE CREATING CAUSE OF ACTION CANNOT PROHIBIT ENFORCEMENT IN OTHER STATES.

When a state creates a cause of action for death occurring therein, it cannot limit the jurisdiction of the courts of other states to enforce it.

## 4. JUDGMENT 816—ENTITLED TO FULL FAITH AND CREDIT, THOUGH ACTION COULD NOT BE MAINTAINED IN OTHER STATES.

A provision of a state statute creating a cause of action for death, that the action may be maintained in a court of competent jurisdiction within the state "and not elsewhere," does not deprive a judgment on such cause of action of the right to be accorded full faith and credit in other states.

## 5. COURTS 391(1)—JUDGMENT UPHOLDING INVALID STATUTE REVIEWABLE ON WRIT OF ERROR.

A judgment of a state court upholding a statute that was invalid as construed is reviewable by writ of error.

On Writ of Certiorari and Writ of Error to the Supreme Court of the State of Illinois.

Action by Thomas P. Kenney, administrator of Donald E. Kenney, against the Su-

preme Lodge of the World, Loyal Order of Moose. A judgment quashing a demurrer to the plea was affirmed by the Supreme Court of Illinois (285 Ill. 188, 120 N. E. 631, 4 A. L. R. 964), and plaintiff brings error and certiorari. Judgment reversed, and writ of certiorari dismissed.

See, also, 249 U. S. 597, 39 Sup. Ct. 390, 63 L. Ed. 795.

Mr. Griffith R. Harsh, of Birmingham, Ala., for petitioner and plaintiff in error.

Messrs. E. J. Henning, of San Diego, Cal., and Ralph C. Putnam, of Aurora, Ill., for respondent and defendant in error.

\*413

\*Mr. Justice HOLMES delivered the opinion of the Court.

This is an action of debt brought in Illinois upon a judgment recovered in Alabama.

\*414

The defendant pleaded \*to the jurisdiction that the judgment was for negligently causing the death of the plaintiff's intestate in Alabama. The plaintiff demurred to the plea, setting up Article IV, sections 1 and 2 of the Constitution of the United States. A statute of Illinois provided that no action should be brought or prosecuted in that State for damages occasioned by death occurring in another State in consequence of wrongful conduct. The Supreme Court of Illinois held that as by the terms of the statute the original action could not have been brought there, the Illinois Courts had no jurisdiction of a suit upon the judgment. The Circuit Court of Kane County having ordered that the demurrer be quashed its judgment was affirmed. 285 Ill. 188, 120 N. E. 631, 4 A. L. R. 964.

[1, 2] In the Court below and in the argument before us reliance was placed upon Anglo-American Provision Co. v. Davis Provision Co., No. 1, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225, and language in *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, the former as showing that the clause requiring full faith and credit to be given to judgments of other State does not require a State to furnish a Court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained.

*Davis Provision Co. v. Anglo-American Provision Co.* was a suit by a foreign corporation on a foreign judgment against a foreign corporation. The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since *Bank of Augusta*



v. Earle, 13 Pet. 579, 589-591, 10 L. Ed. 274; cited 191 U. S. 375, 24 Sup. Ct. 92, 48 L. Ed. 225. Moreover no doubt there is truth in the proposition that the Constitution does not require the State to furnish a Court. But it also is true that there are limits to the power of exclusion and to the power to consider the

\*415

nature of the cause of action before the foreign judgment based upon it is given effect.

In *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039, it was held that the Courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. But this being true, it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent. The assumption that it could not do so was the basis of the decision in *International Text Book Co. v. Pigg*, 217 U. S. 91, 111, 112, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and the same principle was foreshadowed in *General Oil Co. v. Crain*, 209 U. S. 211, 216, 220, 228, 28 Sup. Ct. 475, 52 L. Ed. 754, and in *Fauntleroy v. Lum*, 210 U. S. 230, 235, 236, 28 Sup. Ct. 641, 52 L. Ed. 1039. See *Keyser v. Lowell*, 117 Fed. 400, 54 C. C. A. 574; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 52 L. Ed. 143, and cases cited. Whether the Illinois statute should be construed as the Mississippi Act was construed in *Fauntleroy v. Lum* was for the Supreme Court of the State to decide, but read as that Court read it, it attempted to achieve a result that the Constitution of the United States forbade.

[3,4] Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the State "and not elsewhere." But when the cause of action is created the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this Court. *Tennessee Coal, Iron & R. R. Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685; *Atchison, Topeka & Santa Fé Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; and had

\*416

these decisions been other\*wise they would not have imported that a judgment rendered

exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister State.

[5] As the judgment below upheld a statute that was invalid as construed the writ of error was the proper proceeding and the writ of certiorari must be dismissed.

Judgment reversed.

(252 U. S. 504)

FIRST NAT. BANK OF CANTON, PA., v. WILLIAMS, Comptroller of the Currency.

(Argued March 3, 1920. Decided April 19, 1920.)

No. 618.

1. COURTS ⇐344—GENERAL FEDERAL STATUTE AS TO DISTRICT OF SUIT DISPLACED BY STATUTES RELATING TO SUITS BY NATIONAL BANKS AGAINST COMPTROLLER.

Under Judicial Code, § 24, subd. 16 (Comp. St. § 991), giving District Court jurisdiction of suits by national banking associations, established in the district for which the court is held, to enjoin the Comptroller of the Currency, as provided by the title of the Revised Statutes relating to national banks, and section 49 (Comp. St. § 1031), requiring proceedings to enjoin the Comptroller under the provision of any law relating to such associations to be had in the district where such association is located, section 51 (section 1033), as to the district in which suits may be brought, is displaced pro tanto, and process may be served on defendant wherever found.

2. COURTS ⇐274—SUIT BY NATIONAL BANK AGAINST COMPTROLLER PROPERLY BROUGHT IN DISTRICT WHERE BANK IS LOCATED.

Under Judicial Code, § 24, subd. 16 (Comp. St. § 991), and sections 49 and 51 (sections 1031, 1033), a suit by a national bank to enjoin the Comptroller of the Currency from doing threatened unlawful, arbitrary, and oppressive acts under color of his office, is properly brought in the district in which the bank is located.

3. COURTS ⇐284—WHEN CAUSE OF ACTION ARISES UNDER THE LAWS OF THE UNITED STATES STATED.

A cause of action arises under the laws of the United States, so as to give jurisdiction, where an appropriate statement by plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of an act of Congress.

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

Suit by the First National Bank of Canton, Pa., against John Skelton Williams, Comptroller of the Currency. From a decree dismissing the suit for want of jurisdiction (260 Fed. 674), plaintiff appeals. Reversed.

Mr. John B. Stanchfield, of New York City, for appellant.

Messrs. Solicitor General King and La Rue Brown, of Boston, Mass., for appellee.

\*508

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Appellant, whose place of business is within the Middle district of Pennsylvania, brought this suit in the United States District Court for that district, seeking an injunction to prevent John Skelton Williams, Comptroller of the Currency, from doing certain things under color of his office declared to be threatened, unlawful, arbitrary, and oppressive.

The bill alleges that, in order to injure complainant's president, towards whom he entertained personal ill will, the Comptroller determined to destroy its business, and to that end he had maliciously persecuted and oppressed it for three years, in the following ways, among others: By often demanding special reports and information beyond the powers conferred upon him by law; by disclosing confidential and official information concerning it to banks, members of Congress, representatives of the press, and the public generally; by inciting litigation against it and its officers; by publishing and disseminating false statements, charging it with unlawful acts and improper conduct and reflecting upon its solvency; and by distributing to depositors, stockholders and others alarming statements intended to affect its credit, etc., etc.—and further that, unless restrained, he would continue these and similar malicious and oppressive practices.

Williams is a citizen of Virginia, officially stationed at Washington. He was not summoned while in the Middle district of Pennsylvania, but a subpoena was served upon him in Washington by the United States

\*509

marshal. Having specially appeared, he successfully challenged the jurisdiction of the court; and the cause is here upon certificate to that effect.

Generally, a District Court cannot acquire jurisdiction over an individual without service of process upon him while in the district for which it is held. But here a national bank seeks to enjoin the Comptroller, and the claim is that by statutory direction the proceeding must be had in the district where the association is located, and not elsewhere. The court below took the contrary view. 260 Fed. 674.

Determination of the matter requires consideration of three sections of the Judicial Code.

"Sec. 24. The District Courts shall have original jurisdiction as follows: \* \* \*

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of

any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

"Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."

"Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in

\*510

one district for trial \*in another, in any civil action before a District Court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Comp. St. §§ 991, 1031, 1033.

[1] If sections 24 and 49 properly construed restrict this proceeding to the district where the bank is located, they displace section 51 pro tanto and authorize service of process upon defendant wherever found. *United States v. Congress Construction Co.*, 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163.

[2] It is said for appellee that both sections 24 and 49 relate to injunction proceedings brought under the National Banking Law—such proceedings as are thereby expressly authorized and no others. And further that such law only authorizes suit by a bank to enjoin the Comptroller when he undertakes to act because of its alleged refusal to redeem circulating notes. *R. S. § 5237* (Comp. St. § 9824).

The Act of February 25, 1863, establishing national banks (12 Stats. 665, 681, c. 58):

"Sec. 59. And be it further enacted, that suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

An act to provide a national currency, secured by a pledge of United States bonds, approved June 3, 1864 (13 Stats. 99, 116, c. 106):

"Sec. 57. And be it further enacted, that suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state,



## \*511

county, or \*municipal court in the county or city in which said association is located, having jurisdiction in similar cases: Provided, however, that all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

In *Kennedy v. Gibson* (1869), 8 Wall. 498, 506 (19 L. Ed. 476) this court ruled that section 57 should be construed as if it read: "And be it further enacted, that suits, actions and proceedings by *and against*," etc., the words "by and" having been accidentally omitted. "It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued." "Such suits may still be brought by the associations in the courts of the United States." And it further held "that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship."

The Revised Statutes:

"Sec. 629. The Circuit Courts shall have original jurisdiction as follows: \* \* \*

"Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

"Eleventh. Of all suits brought by (or against) any banking association established in the district for which the court is held, under the provisions of title 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title."

"Sec. 736. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."

Parts of the foregoing subsections 10 and

## \*512

11 were \*joined in subsection 16, § 24, Judicial Code (Comp. St. § 991), and section 736 became section 49, Judicial Code (Comp. St. § 1031).

[3] What constitutes a cause arising "under" the laws of the United States has been often pointed out by this court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Boston & Montana Mining Co. v. Montana Ore Purchasing Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; *Devine v. Los*

*Angeles*, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; *Taylor v. Anderson*, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; *Hopkins v. Walker*, 244 U. S. 486, 489, 37 Sup. Ct. 711, 61 L. Ed. 1270. Clearly the plaintiff's bill discloses a case wherein his right to recover turns on the construction and application of the National Banking Law; and we think the proceeding is one to enjoin the Comptroller under provisions of that law within the true intentment of the Judicial Code.

The decree below must be  
Reversed.

(252 U. S. 512)

## BURNAP v. UNITED STATES.

(Argued March 12, 1920. Decided April 19, 1920.)

(No. 228.)

## 1. UNITED STATES ⇐35—CONGRESS MAY VEST POWER OF APPOINTMENT IN DESIGNATED OFFICERS.

Notwithstanding Const. art. 2, § 2, subd. 2, providing for the appointment of officers by the President, with the advice and consent of the Senate, Congress may vest the appointment of inferior officers in the President alone, in courts of law, or in the heads of departments.

## 2. OFFICERS ⇐7—POWER OF REMOVAL OR SUSPENSION IS INCIDENT OF OTHER POWERS.

The power to remove an inferior officer is, in the absence of statutory provision to the contrary, an incident of the power to appoint, and the power of suspension is an incident of the power of removal.

## 3. UNITED STATES ⇐36—"HEAD OF DEPARTMENT," RESPECTING POWER OF APPOINTMENT, DEFINED.

Within Rev. St. § 169 (Comp. St. § 248), authorizing heads of departments to employ clerks and other employes, "the head of a department" is the Secretary in charge of one of the great divisions of the executive branch of the government, who is a member of the Cabinet, and does not include heads of bureaus or lesser divisions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of Department.]

## 4. UNITED STATES ⇐36—"EMPLOYÉS" IN BUREAU OR DIVISION ARE EMPLOYÉS IN THE DEPARTMENT.

Within Rev. St. § 169 (Comp. St. § 248), as to the appointment of clerks and other employes by heads of departments, persons employed in a bureau or division of a department are as much "employés" in the department as clerks or messengers working under the immediate supervision of the Secretary in charge of the department.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

5. UNITED STATES  36—"EMPLOY" IS EQUIVALENT OF "APPOINT."

Within Rev. St. § 169 (Comp. St. § 248), as to the employment of clerks and employés by heads of departments, the term "employ" is the equivalent of appoint.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employ.]

6. UNITED STATES  36—"CLERKS AND OTHER EMPLOYÉS," WHO MAY BE APPOINTED BY HEAD OF DEPARTMENT, DEFINED; "OFFICER"; "EMPLOYÉ."

In Rev. St. § 169 (Comp. St. § 248), relative to appointments by heads of departments, the term "clerks and other employés" is sufficiently broad to include persons filling positions requiring technical skill, learning, and professional training, and the distinction between an officer and an employé does not rest on differences in the qualifications necessary, or in the services performed, but on the manner in which Congress has provided for the creation of the several positions, their duties, and appointment thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

7. UNITED STATES  36—EMPLOYÉS OF OFFICE OF PUBLIC BUILDINGS AND GROUNDS NOT SUBJECT TO APPOINTMENT BY SECRETARY OF WAR.

Under Rev. St. § 1797, as amended by Act April 28, 1902 (Comp. St. § 3308), giving the Chief of Engineers charge of public buildings and grounds in the District of Columbia, and section 1799 (Comp. St. § 3310), authorizing him to employ such persons as may be appropriated for from year to year, the landscape architect, for whose employment an appropriation is made by Act June 17, 1910, and later appropriation acts should be appointed by the Chief of Engineers, and not by the Secretary of War, notwithstanding Rev. St. § 169 (Comp. St. § 248).

8. UNITED STATES  36 — OFFICER HAVING POWER OF APPOINTMENT HELD AUTHORIZED TO REMOVE EMPLOYÉ.

That a landscape architect in the office of public buildings and grounds was improperly appointed by the Secretary of War, instead of the Chief of Engineers, did not deprive the Chief of Engineers of power to remove him.

9. UNITED STATES  36—APPOINTMENT BY WRONG OFFICER CURED BY ACQUIESCENCE.

The defect in the appointment of a landscape architect in the office of public buildings and grounds, in that he was appointed by the Secretary of War, and not by the Chief of Engineers, was cured by the acquiescence of the Chief of Engineers for five years.

10. UNITED STATES  36—REMOVAL OF EMPLOYÉ IN OFFICE OF PUBLIC BUILDINGS AND GROUNDS NOT IRREGULAR.

If regulations governing the removal of employés in the office of the Chief of Engineers does not apply to employés in the office of public buildings and grounds, the right of removal by the Chief of Engineers was governed only by Act Aug. 24, 1912, § 6 (Comp. St. §

3287), prohibiting removals of persons in the classified service except for cause and for reasons given in writing, and civil service rule 12, and where no requirement of such act or rule was disregarded, there was no irregularity in the suspension or removal of such employé.

Appeal from the Court of Claims.

Suit by George E. Burnap against the United States. The petition was dismissed (53 Ct. Cl. 605), and the petitioner appeals. Affirmed.

Mr. George A. King, of Washington, D. C., for appellant.

\*514

\*Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On July 1, 1910, Burnap entered upon duty in the office of public buildings and grounds as landscape architect at the salary of \$2400 a year, having been appointed to that position by the Secretary of War. On September 14, 1915, he was suspended, upon charges, from duty and pay, and on August 3, 1916, he was discharged "In order to promote the efficiency of the service." His successor was not appointed until July 28, 1917. Burnap contends that his suspension and discharge were illegal, and hence inoperative; that he retained his position until his successor was appointed; and that until such appointment he was entitled to his full salary. *United States v. Wickersham*, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. Ed. 798. His claim for such salary was rejected by the Auditor of the War Department (of which the office of public buildings and grounds is a part), and, upon appeal, also by the Comptroller of the Treasury. Then this suit was brought in the Court of Claims. There his petition was dismissed, and the case comes here on appeal.

Burnap rests his claim mainly upon the fact that he was appointed by the Secretary of War, contending that therefore only the Secretary of War could remove him (21 Op. Attys. Gen. 355), and that no action tantamount to a removal by the Secretary was taken until his successor was appointed. Before discussing the nature and effect of the action taken, it is necessary to consider the general rules of law governing appointment and removal in the civil service of the United States, the statutes relating to the office of public buildings and grounds, and those providing for the appointment of a landscape architect therein.

[1, 2] First. The Constitution (article 2, §

\*515

2, subd. 2) confers upon the \*President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes



Congress to vest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments (6 Op. Attys. Gen. 1). The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint. *Ex parte Hennen*, 13 Pet. 230, 259, 260, 10 L. Ed. 138; *Blake v. United States*, 103 U. S. 227, 231, 26 L. Ed. 462; *United States v. Allred*, 155 U. S. 591, 594, 15 Sup. Ct. 231, 39 L. Ed. 273; *Keim v. United States*, 177 U. S. 290, 293, 294, 20 Sup. Ct. 574, 44 L. Ed. 774; *Reagan v. United States*, 182 U. S. 419, 426, 21 Sup. Ct. 842, 45 L. Ed. 1162; *Shurtleff v. United States*, 189 U. S. 311, 316, 23 Sup. Ct. 535, 47 L. Ed. 828. And the power of suspension is an incident of the power of removal.

Section 169 of the Revised Statutes (Comp. St. § 248) provides that:

"Each head of a department is authorized to employ in his department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employes, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year."

[3-6] The term "head of a department" means, in this connection, the Secretary in charge of a great division of the executive branch of the government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482. Persons employed in a bureau or division of a department are as much employes in the department within the meaning of Section 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary. *Manning's Case*, 13 Wall. 578, 580, 20 L. Ed. 706; *United States v. Ashfield*, 91 U. S. 317, 319, 23 L. Ed. 396. The term "employ" is used as the equivalent of appoint. 21 Op. Attys. Gen. 355, 356. The term "clerks and other

<sup>\*516</sup> employes," as there <sup>\*517</sup>used, is sufficiently broad to include persons filling positions which require technical skill, learning and professional training. 29 Op. Attys. Gen. 116, 123; 21 Op. Attys. Gen. 363, 364; 20 Op. Attys. Gen. 728. The distinction between officer and employe in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employe is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. 15 Op. Attys. Gen. 3; 17 Op. Attys. Gen. 532; 26 Op. Attys. Gen. 627; 29 Op. Attys. Gen. 116; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *United States v. Moore*, 95 U. S. 760, 762, 24 L. Ed.

588; *United States v. Perkins*, 116 U. S. 483, 6 Sup. Ct. 449, 29 L. Ed. 700; *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; *United States v. Hendee*, 124 U. S. 309, 8 Sup. Ct. 507, 31 L. Ed. 465; *United States v. Smith*, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534; *Auffmordt v. Hedden*, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674; *United States v. Schlierholz* (D. C.) 137 Fed. 616; *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484.

Second. The powers and duties of the office of public buildings and grounds had their origin in the Act of July 16, 1790, c. 28, 1 Stat. 130, § 2, which authorized the President to appoint three Commissioners to lay out a district for the permanent seat of the government. By Act of May 1, 1802, c. 41, 2 Stat. 175, the offices of Commissioners were abolished and their duties devolved upon a Superintendent, to be appointed by the President. By Act of April 29, 1816, c. 150, 3 Stat. 324, the office of Superintendent was abolished and his duties devolved upon a Commissioner of Public Buildings. By Act of March 2, 1867, c. 167, § 2, 14 Stat. 466, the office of Commissioner was abolished and his duties devolved upon the Chief of Engineers. By section 1797 of the Revised Statutes, as amended by Act of April 28, 1902, c. 594, 32 Stat. 152 (Comp. St. § 3308), it is declared that the Chief of Engineers has "charge of the public buildings and grounds in the Dis-

<sup>\*517</sup>trict of Columbia, under such regulations as may be prescribed by the President through the War Department." And section 1812 (Comp. St. § 3327) requires the Chief of Engineers, as Superintendent of Public Buildings and Grounds, to submit annual reports to the Secretary of War to accompany the annual message of the President to Congress.

Third. There is no statute which creates an office of landscape architect in the office of public buildings and grounds nor any which defines the duties of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910, c. 297, 36 Stat. 504 (and later appropriation acts in the same form, 36 Stat. 1207; 37 Stat. 388, 706; 38 Stat. 482, 1024; 39 Stat. 93), which reads as follows:

"Public Buildings and Grounds.

"Office of Public Buildings and Grounds: Assistant engineer, two thousand four hundred dollars; assistant and chief clerk, two thousand four hundred dollars; clerk of class four; clerk of class three; clerk and stenographer, one thousand four hundred dollars; messenger; landscape architect, two thousand four hundred dollars; surveyor and draftsman, one thousand five hundred dollars; in all, fourteen thousand three hundred and forty dollars."

Then follow the foremen and night and day watchmen in the parks.

[7] Prior to July 1, 1910, similar appropriation acts had provided for a "landscape gardener" at the same salary. There is no statute which provides specifically by whom the landscape architect in the office of public buildings and grounds shall be appointed. As the office of public buildings and grounds is a part of the bureau of the Chief of Engineers, and that bureau is in the War Department, the Secretary of War would, under section 169, have the power to appoint the landscape architect as an employé in his department, in the absence of other pro-

\*518

vision dealing with the subject. 21 Op. Atty. Gen. 355. But section 1799 of the Revised Statutes (Comp. St. § 3310) provides that:

"The Chief of Engineers in charge of public buildings and grounds is authorized to employ in his office and about the public buildings and grounds under his control such number of persons for such employments, and at such rates of compensation, as may be appropriated for by Congress from year to year."

This more specific provision excludes positions in the office of public buildings and grounds from the operation of the general provision of section 169 conferring the power of appointment upon the heads of departments. Compare 10 Dec. of Comptroller of Treas., 577, 583. The appointment of Burnap by the Secretary of War, instead of by the Chief of Engineers, was without authority in law.

[8, 9] Fourth. As the power to remove is an incident of the power to appoint, the Chief of Engineers would clearly have had power to remove Burnap, if the appointment had been made by him instead of by the Secretary of War. The fact that Burnap was, by inadvertence, appointed by the Secretary, does not preclude the Chief of Engineers from exercising in respect to him the general power to remove employés in his office conferred, by implication, in section 1799 of the Revised Statutes. The defect in Burnap's original appointment was cured by the acquiescence of the Chief of Engineers throughout five years, so that Burnap's status was better than that of a mere *de facto* officer. But it was not superior to what it would have been if he had been regularly appointed by the Chief of Engineers. *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463.

[10] Fifth. The question remains, whether there was a legal exercise by the Chief of Engineers of his power of removal. The suspension of Burnap was by letter from his immediate superior, the officer in charge of the office of public buildings and grounds under the Chief of Engineers; and to the latter the papers were promptly transmitted.

\*519

The discharge was by direct command of the Chief of Engineers. Both the suspension and the discharge purported to be ordered

pursuant to paragraph 13 of section 5 of General Orders No. 5 of the Office of Chief of Engineers, 1915, being regulations governing the classified civil service as applied to the Engineer Department at Large, approved by the Civil Service Commission and the Secretary of War.<sup>1</sup> Burnap contends that the provisions of that paragraph were inapplicable to his position: (1) Because these regulations relate to the Engineer Department at Large and the office of public buildings and grounds is not included therein; and (2) because they relate to employés, and that the landscape architect was an officer, not an employé. As has been shown, Burnap was an employé. But the main contention is wholly immaterial. If paragraph 13 does not apply to the position of landscape architect, the exercise of the right of removal which rested in the Chief of Engineers was governed only by the provisions of the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555 (Comp. St. § 3287),<sup>2</sup> and civil service rule

\*520

XII. For no regulations relating to the matter appear to have been "prescribed by the President, through the War Department" under the authority reserved in Revised Statutes, § 1797, as amended. It is not contended that the procedure adopted in suspending and removing Burnap disregarded any requirement of the act of 1912 or of the civil service rule. Nor are we asked to review the discharge as having been made without adequate cause. The power of removal was legally exercised by the Chief of Engineers; and no irregularity has been pointed out in the suspension which was incident to it.

Sixth. As the power of discharge was vested in the Chief of Engineers and was unaffected by the fact that the appointment had been inadvertently made by the Secretary of War, we have no occasion to consider the contention of Burnap, that it was beyond the Secretary's power to delegate to the Chief of Engineers authority to remove employés in his bureau. Nor need we consider the con-

<sup>1</sup> Paragraph 13: "Discharge for Cause.—Discharge for cause of any regularly appointed classified employé will be subject to the provisions of civil service rule XII and cannot be made without the approval of the Chief of Engineers. An employé may be suspended without pay by the officer in charge, who should at once furnish the employé with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers, with full statement of the facts in the case and the officer's recommendations."

<sup>2</sup> Chapter 389, § 6: "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof;" etc.



tention of the government, that the action taken was tantamount to a removal by the Secretary, because the discharge was ordered by the Chief of Engineers after consideration of the matter at Burnap's request by the Secretary of War, a reference of it by him to the Judge Advocate General, and a return of the papers by the Secretary of War to the Chief of Engineers for action in accordance with the Judge Advocate General's suggestions.

The judgment of the Court of Claims is Affirmed.

(252 U. S. 399)

SOUTH COVINGTON & CINCINNATI ST.  
RY. CO. v. COMMONWEALTH  
OF KENTUCKY.

(Argued March 18 and 19, 1920. Decided April 19, 1920.)

No. 252.

COMMERCE  62 — SEPARATE COACH LAW  
HELD NOT INTERFERENCE WITH INTERSTATE  
COMMERCE AS APPLIED TO PARTICULAR ROAD.

A Kentucky statute requiring railroads to furnish separate coaches for white and colored passengers is not an unconstitutional interference with interstate commerce, as applied to a railroad whose termini and stations are all in the state of Kentucky, and which was constructed by a Kentucky corporation, though operated by another Kentucky corporation, whose lines extend into Ohio, and which carries passengers for a single fare and without change from points on the first road into the state of Ohio.

Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Pitney dissenting.

In Error to the Court of Appeals of the State of Kentucky.

Criminal prosecution by the Commonwealth of Kentucky against the South Covington & Cincinnati Street Railway Company. A judgment against the defendant was affirmed by the Court of Appeals of Kentucky (181 Ky. 449, 205 S. W. 603), and it brings error. Affirmed.

\*400

\*Mr. Alfred C. Cassatt, of Cincinnati, Ohio, for plaintiff in error.

Messrs. Stephens L. Blakely, of Covington, Ky., and Charles Harwood Morris, of Frankfort, Ky., for the Commonwealth of Kentucky.

Mr. Justice McKENNA delivered the opinion of the Court.

The Railway Company was indicted for a violation of a statute of Kentucky which required companies or persons running or operating railroads in the state, to furnish separate coaches or cars for white and colored passengers.

The statute (Ky. St. § 795), as far as we are concerned with it, is as follows:

All corporations, companies or persons "engaged in running or operating railroads, of this state, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

\*401

\*It is also provided that there shall be no difference or discrimination in the quality of the coaches or cars. A violation of the act is made a misdemeanor.

Interurban electric railroads are subject to the above provisions. We may say in passing that the railway company denies that it is interurban, but admits that the fact has been decided against it and accepts the ruling. It will be considered, therefore, as interurban and being so it was within the law and the charge of the indictment. The charge is that it (the company) at the time designated—

"then and there had authority and was authorized to operate a line of railroad ten miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership and lease of and from the Cincinnati, Covington & Erlanger Railway Company, a corporation organized under the laws of the commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad ten miles in length in this county between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this commonwealth, said defendant then and there operating said line of railroad, the construction of which by the Cincinnati, Covington & Erlanger Railway Company had theretofore been authorized."

And having such authority and control of the line of railroad, the company violated the law of the state by not observing its requirement as to separate coaches.

The defense to the action was, and the contention here is, not that the facts charged are not true, but that the statute so far as it is attempted to be made applicable to the company is an interference with interstate commerce, and that the defense was made in the trial court in a motion to dismiss and for a new trial and also in the Court of Appeals.

In support of the contention it is stated that the company's principal business was interstate commerce, the \*carriage of passengers between Cincinnati and the Kentucky cities across the Ohio river; that the car in ques-

\*402

tion was an ordinary single truck street car solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Ky., and a suburb about five miles distant; and that 80 per cent. of the passengers carried were interstate.

The reply made by the state, and expressed by the Court of Appeals, to the contention is that the railway company is a Kentucky corporation and by its charter was given authority "to construct, operate and manage street railways in the City of Covington and vicinity," "and along such streets and public highways in the city as the council shall grant the right of way to," "and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of." And further:

"It may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or intersect therein, in Covington, Cincinnati, Newport or vicinity," etc.

The Court of Appeals further declared that the railway company became in some way the owner of all of the stocks of the Cincinnati, Covington & Erlanger Railway Company, and that the corporations are operated under the same general management, and—

"that the elder corporation operating in the name of the junior, actually constructed its road, and has been operating it from the beginning, being the owner of the cars which are operated upon the road. The motive power is electricity and is the property of the elder corporation, the cars upon the road are such as are ordinarily used upon street railroads, and such as the elder corporation uses upon the street railroads of its system. A fare of five cents is charged for passage from any point upon the road of the Cincinnati, Covington & Erlanger Company, to any point on the system

of the South Covington & Cincinnati Street Railway Company, and from one point to another upon the entire system of the latter company, and transfers are given for all connecting lines. Many persons, who take passage upon the line of the Cincinnati, Covington & Erlanger Railway Company, at its terminus, near Erlanger, and at other places along its lines, are transported without change of cars, into Cincinnati, in the state of Ohio, as it connects with the lines of the South Covington & Cincinnati Street Railway Company, at its terminus, in the city of Covington."

Separate coaches were not provided as required by the law.

These being the facts, the Court of Appeals decided that there was no interference with or regulation of interstate commerce. "Each of the termini," the court said, "as well as all the stations of the Cincinnati, Covington & Erlanger Railway Company's road, is within the state of Kentucky." And it was concluded that "the offense charged and for which the" railway was "convicted was the operation of the railroad, in an unlawful manner, within the state, and in violation of one of

the measures enacted under the police powers of the state."

In answer to, and in resistance to, the conclusion of the court, the railway company contends that it operates a railway between designated termini, one being in Kentucky and the other in Ohio; that the price of a fare may be the single one of five cents for the complete trip in the same coach taken at or terminating at, the respective termini; and that therefore the car and passenger are necessarily interstate. Thus viewed they undoubtedly are, but there are other considerations. There was a distinct operation in Kentucky, an operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington Railway v. Covington*, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792.

\*404

The \*regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands.

The cited case points out the equal necessity, under our system of government, to preserve the power of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the state under the circumstances presented by this record, by running its coaches beyond the state lines. But we need not extend the discussion. The cited case expresses the principle of decision and marks the limitation upon the power of a state and when its legislation is or is not an interference with interstate commerce. And regarding its principle, we think, as we have said, the act in controversy does not transcend that limitation.

Judgment affirmed.

Mr. Justice DAY (dissenting). If the statute of the state of Kentucky, here involved, as enforced by the decision under review imposes an unreasonable burden upon interstate commerce, the conviction should be reversed. To determine this question it is necessary to have in mind precisely what the charge was, and the nature of the traffic to which it was applied. The South Covington & Cincinnati Street Railway Company was charged with the offense of unlawfully running and operating a coach or car by electricity on a railroad track within the state of Kentucky, without causing or having a separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without having its coach



or car divided by a good and substantial

\*405

\*wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart.

There is no conflict of testimony, and the record shows that the company was engaged in the operation of a street railway system whose principal business was interstate commerce, carrying passengers between Cincinnati and Kentucky cities across the Ohio river; that the car in question, described in the indictment, was an ordinary single truck street car seating 32 passengers, about 21 feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Ky., and well-populated territory adjacent thereto, to a point near Ft. Mitchell, a suburb, about 5 miles distant. Eighty per cent. of the passengers carried were interstate. Not to exceed 6 per cent. of the passengers carried at any time were colored, and on a large proportion of the trips no colored passengers were carried.

The question for determination is: Whether under such circumstances the requirement of the statute of the state of Kentucky that railroad companies doing business in that state shall be required to furnish separate coaches and cars for the travel or transportation of white and colored persons or cars with compartments, as described in the indictment, is constitutional? The nature of the traffic of the South Covington & Cincinnati Street Railway Company was considered by this court in *South Covington & Cincinnati Street Railway Co. v. City of Covington*, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792, and we held that the traffic between Kentucky and Ohio on the same cars, under the same management, and having a single fare constituted interstate commerce. See 235 U. S. 545, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792, and cases cited. In that case we held that an ordinance of the

\*406

city of Covington, which under\*took to determine the number of cars and passengers to be carried in interstate transportation was invalid as a burden upon interstate commerce, and that as to certain regulations affecting the safety and welfare of passengers, the ordinance was valid until Congress saw fit to regulate the interstate transportation involved.

It is true that a portion of the transportation involved in the present case is over the track of a railroad company organized under the laws of Kentucky. But that road had no cars, conducted no railroad operations, and its stock was owned and it was operated by the South Covington & Cincinnati Street Railway Company. The car, for which the indictment was returned, and the conviction had, was operated only in interstate traffic, and whether over one road or the other, such

operation was interstate commerce, and plainly within the authority of Congress. In the absence of congressional regulation the state had power to make reasonable rules, not burdening interstate commerce, which should be enforced until Congress otherwise enacted.

The question in this case then is: Was the application of this statute a reasonable regulation? The traffic consists in running a single car, of the character already described, from Fountain Square, Cincinnati, a distance of about 6 miles, to Ft. Mitchell, a suburb of South Covington, Ky. How could this separate car or compartment statute be complied with? It is first suggested a separate car could be put on for the accommodation of colored passengers for the distance of the intrastate run on the Kentucky side of the river. In view of the nature of the transportation and the meager patronage compared with the expense of such an undertaking, this method would be impracticable without interrupting travel and entailing a great loss upon the company. Secondly, it is suggested, and this seems to be the weight of the argument, that cars could be constructed with a separate compartment for the few colored

\*407

\*persons who ride in the car after it reaches or before it leaves Kentucky. It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Kentucky to Cincinnati, or going from Cincinnati to Kentucky on a through trip, would not be subject to the regulation. The few colored passengers traveling exclusively in the state of Kentucky in this car would thus be discriminated against by reason of the different privilege accorded to other colored passengers on the same car, a condition not likely to promote the peace or public welfare.

As this transportation is also subject to regulation in the state of Ohio (see section 12940 Ohio Gen. Code), and as by the laws of that state no such separation of passengers is permitted, it follows that upon the same trip the traffic would be the subject of conflicting regulations, calculated to be destructive of the public policy which it is supposed to be the design of this statute to promote; a condition which we said in *South Covington Street Railway Case*, supra, would breed confusion, greatly to the detriment of interstate traffic.

This case is quite different from *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244, in which the statute now under consideration was before the court, and wherein it was held that the law was valid when applied to a carrier operating an interstate road. The act was held to be separable, and capable of being complied with within the state by attaching a car for passengers traveling only within the state. That case presented quite a differ-

ent situation from the operation of the single street car here involved.

The present indictment is for running an ordinary street car upon an interstate journey of only about 6 miles, with 80 per cent. of its travel interstate, and not over 6 per cent. of the passengers colored, and on many trips no colored passengers at all. As we have indicated, the attachment of the additional car upon the Kentucky side on so short

\*408

a journey would burden interstate commerce as to cost and in the practical operation of the traffic. The provision for a separate compartment for the use of only intrastate colored passengers would lead to confusion and discrimination. The same interstate transportation would be subject to conflicting regulation in the two states in which it is conducted.

It seems to me that the statute in question as applied to the traffic here involved is an unreasonable regulation and burdensome to interstate commerce, and, therefore, beyond the power of the state. I think the judgment should be reversed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY concur in this dissent.

(252 U. S. 408)

CINCINNATI, C. & E. RY. CO. v. COMMONWEALTH OF KENTUCKY.

(Argued March 18 and 19, 1920. Decided April 19, 1920.)

No. 253.

COURTS ⇐399(1)—SUPREME COURT'S POWER TO REVIEW DECISION OF STATE COURTS LIMITED TO FEDERAL QUESTION.

Where, in a criminal prosecution against a railroad company for violating a law requiring separate coaches for white and colored passengers, the state Court of Appeals decided that the facts made the company an offender against the statute, and that the statute was not an interference with interstate commerce, the reviewing power of the federal Supreme Court is limited to the question whether such law is an interference with interstate commerce.

Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Pitney dissenting.

In Error to the Court of Appeals of the State of Kentucky.

Criminal prosecution by the Commonwealth of Kentucky against the Cincinnati, Covington & Erlanger Railway Company. A judgment against defendant was affirmed by the Court of Appeals of Kentucky (181 Ky. 449, 205 S. W. 603), and defendant brings error. Affirmed.

Mr. Alfred C. Cassatt, of Cincinnati, Ohio, for plaintiff in error.

\*409

\*Messrs. Stephens L. Blakely, of Covington, Ky., and Charles Harwood Morris, of Frankfort, Ky., for the Commonwealth of Kentucky.

Mr. Justice McKENNA delivered the opinion of the Court.

This case was argued with No. 252, South Covington & Cincinnati Street Railway Co. v. Commonwealth of Kentucky, 252 U. S. 399, 40 Sup. Ct. 378, 64 L. Ed. —. It was disposed of by the Court of Appeals with that case in one opinion. The company was indicted, as the other company was, of a violation of the Separate Coach Law of the state (Ky. St. § 795), and found guilty. The facts are in essence the same as in the other case, though the indictment is more elaborate. The defenses and contentions are the same. We have stated them, and upon what they are based, and the character and relation of the companies, in our opinion in the other case.

The company is an interurban road, and the Separate Coach Law is applicable to it. It was incorporated under the general laws of the state, and authority conferred upon it to construct and operate an electric railway from the city of Covington to the town of Erlanger, and to such further point beyond Erlanger as might be determined. It was constructed from Covington to a point just beyond the suburban town called Ft. Mitchell, a town of a few hundred inhabitants.

The South Covington & Cincinnati Street Railway Company furnished the means to build the road, and at the time covered by the indictment was operating the road as part of its railway system, as described in the other case.

The intimate relations of the roads, as stated by the Court of Appeals, we have set forth in the other case, and it is only necessary to add that the indictment in the present case charges that the company in this case was

\*410

\*the lessor of the other company, and "thereby permitted and brought about the acquisition of its rights and privileges, knowing that" the other company, "would not operate and run separate coaches for its white and colored passengers." And it is charged that the other company operating the lease violated the law, and that the defendant company, knowing of the intended method of operation, also violated the law. These facts and other facts the Court of Appeals decided made the company an offender against the statute, and decided further that the statute was not an interference with interstate commerce. The conviction of the company was sustained.

Our reviewing power, we think, is limited to the last point—that is, the effect of the law as an interference with interstate Commerce—and that we disposed of in the other case. The distinction counsel make between



street railways and other railways, and between urban and interurban roads, we are not concerned with.

Judgment affirmed.

Mr. Justice DAY (dissenting). This case is controlled by the disposition made of No. 252. While it is true that the Erlanger Company was incorporated under the laws of the state of Kentucky, the proof shows that its road was built and operated by the South Covington & Cincinnati Street Railway Company as part of the latter's system. This is not a proceeding to test the right to operate the road. The conviction is justified because the local company permitted the principal company to operate without separate coaches or compartments for its colored passengers. The traffic conducted is of an interstate nature, and the same reasons which impel a dissent in No. 252 require a like dissent in the present case.

In my opinion the single traffic over both  
\*411  
railroads being interstate, the regulation embodied in the statute and for which the conviction was had, as to both roads, is an unreasonable and burdensome interference with interstate commerce.

Mr. Justice VAN DEVANTER, and Mr. Justice PITNEY concur in this dissent.

(252 U. S. 416)

STATE OF MISSOURI v. HOLLAND, U. S. Game Warden.

(Argued March 2, 1920. Decided April 19, 1920.)

No. 609.

1. INJUNCTION ⇨85(2)—PROPER REMEDY FOR INVASION OF STATE'S QUASI SOVEREIGN RIGHTS BY FEDERAL GOVERNMENT.

A bill to prevent a United States game warden from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, as an unconstitutional interference with the reserved rights of the state, is a reasonable and proper means of asserting the alleged quasi sovereign rights of the state.

2. GAME ⇨4—ACT CARRYING PROVISIONS OF MIGRATORY BIRD TREATY INTO EFFECT IS VALID.

If the treaty between the United States and Great Britain proclaimed December 8, 1916, regulating the killing of migratory birds, is valid, the act of July 3, 1918, carrying its provisions into effect, is also valid, under Const. art. 1, § 8, giving Congress power to make all laws necessary and proper for carrying into execution the powers thereby conferred.

3. TREATIES ⇨2 — TEST OF VALIDITY NOT POWER OF GOVERNMENT TO DO SAME THING BY STATUTE.

The test of the validity of a treaty is not the power of the government to do the same thing by an act of Congress.

4. TREATIES ⇨2—MIGRATORY BIRD TREATY IS VALID.

The treaty between the United States and Great Britain, proclaimed December 8, 1916, and regulating the killing and sale of migratory birds, is a proper exercise of the treaty power delegated to the United States government by Const. art. 2, § 2, as the state has no ownership of such birds nor exclusive authority to regulate their killing.

5. TREATIES ⇨7—BINDING WITHIN TERRITORIAL LIMITS OF STATE.

Valid treaties are as binding within the territorial limits of the states as throughout the dominion of the United States.

6. TREATIES ⇨7 — MAY OVERRIDE STATE'S CONTROL OF PRIVATE RELATIONS.

While the great body of private relations usually fall within the control of the state, a treaty may override the power of the state.

Mr. Justice Van Devanter and Mr. Justice Pitney, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri.

Suit by the State of Missouri against Ray P. Holland, United States Game Warden. From a decree dismissing the suit on motion (258 Fed. 479), plaintiff appeals. Affirmed.

Messrs. J. G. L. Harvey, of Kansas City, Mo., and John T. Gose, of Shelbina, Mo., for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellee.

\*430

\*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to en-

\*431

force the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas v. Colorado*, 185 U. S. 125, 142, 22 Sup. Ct. 552, 46 L. Ed. 838; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237,

27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488; *Marshall Dental Manufacturing Co. v. Iowa*, 226 U. S. 460, 462, 33 Sup. Ct. 168, 57 L. Ed. 300. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional. 258 Fed. 479. *Acc. United States v. Thompson* (D. C.) 258 Fed. 257; *United States v. Rockefeller* (D. C.) 260 Fed. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those

\*432

terms, to be made by \*the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

[2] To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

[3] It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act

of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 Fed. 154. *United States v. McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

\*433

\*Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33, 23 Sup. Ct. 237, 47 L. Ed. 366. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is

\*434

whether \*it is forbidden by some invisible radiation from the general terms of the



Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

[4-6] The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U. S. 678, 683, 7 Sup. Ct. 656, 657, 32 L. Ed. 766. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it

was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, 2 L. Ed. 497, with regard to

•435

statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, 2 Wheat. 259, 275, 4 L. Ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *DeGeofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Blythe v. Hinckley*, 180 U. S. 333, 340, 21 Sup. Ct. 390, 45 L. Ed. 557. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhuis' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565. See *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. 886.

Decree affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

(252 U. S. 436)

BLUMENSTOCK BROS. ADVERTISING  
AGENCY v. CURTIS PUB. CO.(Submitted Jan. 26, 1920. Decided April 19,  
1920.)

No. 197.

1. MONOPOLIES ⇐28—CAUSE OF ACTION IS  
STATUTORY, AND CAN ONLY BE BROUGHT IF  
COMPLAINT STATES SUBSTANTIAL CASE.

An action for damages under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), giving a right of action for damages for injury from anything forbidden by that act, is wholly statutory and to maintain a suit the complaint must state a substantial case arising thereunder.

2. COURTS ⇐299—ALLEGATION THAT FEDERAL  
QUESTIONS ARISE NOT SUFFICIENT TO  
GIVE JURISDICTION.

To give a federal court jurisdiction, it is not enough to allege that questions of a federal character arise in the case; but it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial.

3. MONOPOLIES ⇐28—ACTION FOR DAMAGES  
CAN ONLY BE MAINTAINED IF ARISING OUT  
OF INTERSTATE COMMERCE.

The Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830) derives its authority from the power of Congress to regulate interstate commerce, and an action for damages under section 7 (section 8829) is not maintainable, unless the dealings forming the subject-matter of complaint were transactions of interstate commerce.

## 4. COMMERCE ⇐16—TERM DEFINED.

"Commerce" is not traffic alone, but is intercourse between nations and parts of nations in all its branches.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commerce.]

5. COMMERCE ⇐16—CONTRACTS FOR ADVERTISING  
IN PERIODICALS NOT INTERSTATE  
COMMERCE.

Contracts for the insertion of advertising matter in periodicals circulating in interstate commerce do not so directly affect interstate commerce as to themselves constitute such commerce, so as to authorize an action under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), for damages resulting from defendant's attempt to monopolize the advertising business.

In Error to the District Court of the United States for the Northern District of Illinois.

Suit by the Blumenstock Bros. Advertising Agency against the Curtis Publishing Company. The suit was dismissed for want of jurisdiction, and plaintiff brings error. Affirmed.

Mr. Collin C. H. Fyffe, of Chicago, Ill., for plaintiff in error.

Mr. Amos C. Miller, of Williamsport, Pa., for defendant in error.

\*437

\*Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by the Blumenstock Bros. Advertising Agency against the Curtis Publishing Company in the District Court of the United States for the Northern District of Illinois to recover treble damages under section 7 of the Sherman Anti-Trust Act (26 Stat. 209 [Comp. St. § 8829]). The case here concerns the question of the jurisdiction of the District Court. Judicial Code, § 238. The plaintiff is a corporation of the state of Missouri; the defendant a corporation of the state of Pennsylvania. The defendant appeared specially in the District Court and moved to dismiss the complaint for want of jurisdiction; the grounds stated being:

(1) "That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the state of Missouri, and that this defendant is a citizen and resident of the state of Pennsylvania."

(2) "That in none of said counts is a cause of action stated by plaintiff within the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The court entered judgment dismissing the suit for want of jurisdiction over the defendant or the action.

The record contains a certificate stating that the court found that it had no jurisdiction of the defendant and no jurisdiction to entertain the action. The certificate further states that the question involved is whether the transaction set forth in the several counts of the declaration involves a question of interstate commerce, and whether the averments in said several counts of the declaration state a cause of action within the provisions of the Act of July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830).

The declaration is voluminous, containing

\*438

five counts \*and an additional count. So far as it is necessary for our purpose, the cause of action of the plaintiff may be said to rest upon the allegations: That the plaintiff is engaged at Chicago in conducting an advertising agency. That when customers or principals desire to place advertisements in the magazines and periodicals of the trade they make plaintiff their agent, and plaintiff contracts with the defendant and other publishers and distributors of magazines; that plaintiff had many customers with whom it placed advertisements in the periodicals published and distributed by the defendant and



in other periodicals of other publishers, all of which were distributed throughout the United States and the several states thereof; that the defendant was the owner and publisher of three periodicals sold and distributed throughout the United States, known as the Saturday Evening Post, the Ladies Home Journal, and the Country Gentleman; that the business of the defendant in publishing, selling, and distributing said periodicals was interstate commerce. The character of each of the several publications is described, and a large circulation is attributed to each of them; and it is stated that in publishing and distributing said periodicals defendant held itself out as desirous of taking, receiving, printing, publishing, and distributing throughout the United States its publications and advertisements to persons, firms, and corporations concerning their business and occupation; that in the course of the business the defendant dealt with the plaintiff and other advertising agencies; that the defendant in the regular course of its business dealt with not only advertisers, but with advertising agencies such as the plaintiff, and it is alleged that such dealings were transactions of interstate commerce, and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its

\*439

customers and advertising agencies was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; that the defendant's periodicals, particularly "The Saturday Evening Post," have an important position among such publications, and are largely read throughout the United States; that "The Saturday Evening Post" is the most necessary of such advertising mediums to the customers of the plaintiff; that the defendant's periodicals, together with certain other magazines, periodicals and publications owned by persons other than the defendant, had, to a certain extent, exclusive control of a certain field of advertising; that the magazines and other publications which control and do all the advertising business of the field in question are few in number; that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; that the defendant was desirous of using its preponderant position in this special field of advertising as a means

of acquiring for itself and its publications, especially for "The Saturday Evening Post," a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United States in violation of the Anti-Trust Act; that the defendant refused without any reasonable cause to accept proper and ordinary advertising matter or copy offered in the usual way to the defendant by the plaintiff and other advertising agencies unless the plaintiff, and other advertising agencies, would agree to allow the defendant to in-

\*440

crease its preponderance in said advertising field by permitting it to control and limit and reduce, at the will of the defendant, the amount of advertising given by the plaintiff and other advertising agencies to the owners and publishers of other magazines, journals, periodicals and other publications aforesaid, which were competing with the defendant in the field of advertising mentioned and described; that by reason of the illegal and wrongful acts, done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in, and to monopolize the advertising business, plaintiff lost the business of its customers for whom it had been acting as agent in placing of advertisements with defendant's and other publications, and was prevented from making further contracts for the placing of advertising matter in publications of the defendant, and in consequence thereof, in any other publication of a like or similar character, to the damage of the plaintiff in the sum of \$25,000.

The declaration contains an alleged cause of action at common law, but, as neither the plaintiff nor the defendant reside in the district in which the suit was brought, it is conceded that such cause of action could not be maintained in that court against the defendant's objection. Section 51, Judicial Code (Comp St. § 1033).

[1] The Sherman Anti-Trust Act (section 7) created a cause of action in favor of any person to recover by suit in any District Court of the United States, in the district in which the defendant resides or is found, threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

[2] In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded or only a question of the jurisdiction of the court. In any case alleged to come within the federal juris-

diction it is not enough to allege that questions of a federal character arise in the case, it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial. *Newburyport Water Co. v. City of Newburyport*, 193 U. S. 562, 576, 24 Sup. Ct. 553, 48 L. Ed. 795.

\*441

\*In cases where, as here, the controversy concerns a subject-matter limited by federal law, for which recovery can be had only in the federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy cases (*Grant v. Laird*, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591), in copyright cases (*Globe Newspaper Co. v. Walker*, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. Ed. 1096), in patent cases (*Healy v. Sea Gull Specialty Co.*, 237 U. S. 479, 35 Sup. Ct. 658, 59 L. Ed. 1056), in admiralty cases (*The Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907).

We come then to inquire whether the cause of action stated was a substantial one within section 7 of the Sherman Anti-Trust Act. It is not contended that any combination, conspiracy, or contract in restraint of trade is alleged such as would bring the case within the first section of the act. The second section is relied upon which in terms punishes persons who monopolize or attempt to monopolize, or combine with others to monopolize any part of trade or commerce among the several states or with foreign nations.

[3] The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the states. It declares unlawful combinations, conspiracies, and contracts and attempts to monopolize which concern such trade or commerce. It follows that if the

\*442

dealings with the defendant, which \*form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

[4] Commerce, as defined in the often quoted definition of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 189 (6 L. Ed. 23) is not traffic alone; it is intercourse;

"it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

[5] In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications

throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

This case is wholly unlike *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, wherein there was a continuous interstate traffic in text-books and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and nonresident merchants of goods situated in another state, was not engaged in interstate

\*443

commerce; and within that line of \*cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *N. Y. Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332. We held in *Hopkins v. United States*, 171 U. S. 579, 19 Sup. Ct. 40, 43 L. Ed. 290, that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the live stock was sent from other states. In *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186, we held that labor agents engaged within the state of Georgia in hiring persons to be employed outside the state were not engaged in interstate commerce. In *Ware & Leland v. Mobile Co.*, 209 U. S. 405, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031, we held that brokers taking orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce.

In the recent case of *United States Fidelity & Guaranty Co. v. Kentucky*, 231 U. S. 394, 34 Sup. Ct. 122, 58 L. Ed. 283, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon



the credit and standing of persons in the state, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the state. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate

\*444

commerce, \*or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the state of Kentucky from imposing a privilege tax upon such business.

Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under section 7 of the Sherman Anti-Trust Act. The court was right in dismissing the suit.

Affirmed.

---

(252 U. S. 376)

CALDWELL v. PARKER, Sheriff.

(Argued March 4 and 5, 1920. Decided April 19, 1920.)

No. 636.

1. WAR ⚡31—INTENTION TO DEPRIVE STATE COURTS OF JURISDICTION OF OFFENSES BY SOLDIERS MUST BE CLEAR.

Conceding the power of Congress to provide that, as the mere result of a declaration of war, state authority over offenses committed by persons in the military service shall be completely destroyed, the known hostility of the American people to interference by the military with the regular administration of justice in the civil courts requires that such intention should not be ascribed to Congress, in the absence of clear and direct language to that effect.

2. WAR ⚡32—JURISDICTION OF MILITARY COURTS OVER OFFENSES OF SOLDIERS IN TIME OF WAR NOT EXCLUSIVE.

Articles of War of 1916, art. 92 (Comp. St. § 2308a), providing for punishment of murder or rape as a court-martial may direct, but prohibiting trial by court-martial in time of peace, article 93, providing for the punishment of various other offenses as a court-martial may

direct, and article 74, requiring military authorities to deliver accused persons to the civil authorities, except in time of war, do not give military courts exclusive jurisdiction in time of war of offenses committed in violation of state laws by persons in the military service, and a state court has jurisdiction of such offenses.

Appeal from the District Court of the United States for the Northern District of Alabama.

Petition by Edgar C. Caldwell, for a writ of habeas corpus, directed to W. E. Parker, Sheriff of Calhoun County, Ala. From a judgment denying a discharge of the petitioner from custody, he appeals. Affirmed.

Messrs. Henry E. Davis, of Washington, D. C., and Charles D. Kline, of Anniston, Ala., for appellant.

Messrs. Neil P. Sterne, of Anniston, Ala., and J. Q. Smith, of Birmingham, Ala., for appellee.

\*380

\*Mr. Chief Justice WHITE delivered the opinion of the Court.

Pending the existence of a state of war with Germany the appellant, a soldier in the army of the United States serving in a camp in Alabama, was tried and convicted for the murder of a civilian at a place within the jurisdiction of the state and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. The conviction was reviewed and affirmed by the Supreme Court of Alabama and was re-examined and reaffirmed on rehearing.

The case is here to reverse the action of the court below in refusing on writ of habeas corpus a discharge which was prayed on the ground that, under the circumstances stated, the sentence was void because the state court had no jurisdiction whatever over the subject of the commission of the crime, since under the Constitution and laws of the United States that power was exclusively vested in a court-martial.

As there was no demand by the military authorities for the surrender of the accused, what would have been the effect of such a demand, if made, is not before us. The contention of a total absence of jurisdiction in the state court is supported in argument, not only by the appellant, but also by the United States in a brief which it has filed as amicus curiæ. These arguments, while differing in forms of expression, rest upon the broad assumption that Congress in re-enacting the Articles of War in 1916 (Comp. St. § 2308a), by an exercise of constitutional authority, vested in the military courts during a state of war exclusive jurisdiction to try and punish persons in the military service for offenses

\*381

\*committed by them which were violative of the law of the several states. In other words, the proposition is that under the act of 1916,

by mere operation of a declaration of war, the states were completely stripped of authority to try and punish for virtually all offenses against their laws committed by persons in the military service. As in both arguments differences between the provisions of the act of 1916 and the previous Articles are relied upon to sustain the accomplishment of the result contended for, we must briefly consider the prior Articles before we come to test the correctness of the conclusion sought to be drawn from the Articles of 1916.

The first Articles of War were adopted in 1775. By them the generic power of courts-martial was established as follows:

"L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the Articles of War, are to be taken cognizance of by general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion."

It cannot be disputed that the effect of this grant was to confer upon courts-martial as to offenses inherently military an exclusive authority to try and punish. In so far, however, as acts which were criminal under the state law but which became subject to military authority because they could also appropriately be treated as prejudicial to good order and military discipline, a concurrent power necessarily arose, although no provision was made in the Articles regulating its exercise. But this omission was provided for in article 1 of section X of the revised Articles adopted in 1776, as follows:

"Whenever an officer or soldier shall be accused of a capital crime, or of having used violence, or of having committed any offense against the persons or property of the good

\*382

people \*of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made, or in behalf of the party or parties, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall willfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

In view of the terms of this article and the fact that it was drawn from the British Articles, where the supremacy of the civil law had long prevailed, it results that its provisions gave the civil courts, if not supremacy

of jurisdiction, at least a primary power to proceed against military offenders violating the civil law, although the same acts were concurrently within the jurisdiction of the military courts because of their tendency to be prejudicial to good order and military discipline.

And in harmony with this view, the articles in question were applied up to 1806, in which year they were re-enacted without change as articles 99 and 33 of that revision, and were in force in 1863, in the Enrollment Act of which year it was provided (Act of March 3, 1863, § 30, 12 Stat. 736):

"That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit

\*383

\*rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed."

It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, from which their authority had been from 1775 expressly excluded; and power was also given to deal, under the conditions stated and in the manner specified, with other enumerated offenses over which they had not prior to the passage of the act had jurisdiction, presumably because such acts had not in practice been treated as within the grant of authority to deal with them as prejudicial to good order and military discipline.

In 1874, when the Articles of War were revised and re-enacted (Rev. Stat. U. S. § 1342), the generic grant of power to punish acts prejudicial to good order and military discipline was re-expressed in article 62, substantially as it existed from 1775. The provisions of section 30 of the act of 1863, supra, were in so many words made to constitute article 58, and the duty put upon military officials to surrender to state officers on demand persons in the military service charged with offenses against the state, was re-enacted in article 59, qualified, however, with the words, "except in time of war." Thus the Articles stood until they were re-enacted in the revision of 1916, as follows:

The general grant of authority as to acts prejudicial to good order and military discipline was re-enacted in article 96, substantially as it had obtained from the beginning. The capital offenses of murder and rape, as enumerated in section 30 of the act of 1863,

\*384

were placed in a distinct article \*and power



was given to military courts to prosecute and punish them, as follows:

"Article 92. *Murder—Rape*.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may (be) direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace." 39 Stat. 664.

The remaining offenses enumerated in the act of 1863 were placed in a separate article, as follows:

"Art. 93. *Various Crimes*.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." 39 Stat. 664.

And, finally, the duty to respond to the demand of the state authorities for the surrender of military offenders against the state criminal laws was re-enacted as it had prevailed from the beginning, subject, however, to express regulations to govern in case of conflict between state and federal authority, and again subject to the qualification, "except in time of war," as first expressed in the revision of 1874; the article being as follows:

"Art. 74. *Delivery of Offenders to Civil Authorities*.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the states of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused

\*385

person to the civil \*authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused persons to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct." 39 Stat. 662.

[1] Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the

subject for, as said in *Coleman v. Tennessee*, 97 U. S. 509, 514 (24 L. Ed. 1118):

"With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."

Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775 were, as we have seen, in the very midst of the War for Independence, modified in 1776 to make certain the preservation of the civil power.

[2] But the contention relied upon is directly based upon the words, "except in time of war," as qualifying the duty of the military officers to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, imposed by article 74, and the grant in article 92, expressed in the form of a negative pregnant, of authority to courts-

\*386

martial to try capital \*crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war. Both these provisions took their origin in the act of 1863 and were drawn from the terms of that act as re-expressed in the revision of 1874. By its very terms, however, the act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon. It is true, indeed, that by the act authority was for the first time given, as pointed out in the *Coleman Case*, 97 U. S. 509, 514, 24 L. Ed. 1118, to courts-martial or military commissions to deal with capital and other serious crimes punishable under the state law. But the act did not purport to increase the general powers of courts-martial by defining new crimes, or by bringing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but, simply contemplated endowing the military authorities with power, not to supplant, but to enforce, the state law. As observed by Winthrop, in his work on *Military Law* (2d Ed.) p. 1033, it was intended to provide, through the military authorities, means of enforcing and punishing crimes against the state law committed by persons in the military service where as the result of the existence of martial law or of military operations, the courts of the state were not open and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text, to which we have already called attention, which caused the court in the *Coleman Case* to say that that statute had no application to territory where "the civil courts were open

and in the undisturbed exercise of their jurisdiction." 97 U. S. 515, 24 L. Ed. 1118.

As in 1866 it was settled in *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations, gave no power to the military authorities where the civil courts were open and capable of per-

\*387

forming their duties, to disregard their authority or frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed open to grave doubt whether it was the purpose of Congress, by the words "except in time of war," or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified—a doubt which, if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the revision of 1874 is considered, since in that revision the act of 1863 was in terms reenacted and the words "except in time of war," appearing for the first time in article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt; that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

Into the investigation of the subject of whether it was intended by the provision "except in time of war," contained in the Articles of 1916, to do more than meet the conditions exacted by the actual exigencies of war like those contemplated by the act

of 1863, and which were within the purview of military authority, as pointed out in *Re Milligan*, we do not feel called upon to enter. We say this because even though it be conceded that the purpose of Congress by the Articles of 1916, departing from everything which had gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admis-

\*388

sion is here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of the state of war, to the punishment, as military crimes, of acts criminal under the state law, without the slightest indication of purpose to exclude the jurisdiction of state courts to deal with such acts as offenses against the state law.

And this conclusion harmonizes with the principles of interpretation applied to the Articles of War previous to 1916 (*Drury v. Lewis*, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. Ed. 343; *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1048, 11 Ann. Cas. 640; *Franklin v. United States*, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615; *Steiner's Case*, 6 Op. Atty. Gen. 413, and is, moreover, in accord with the decided cases which have considered the contention of exclusive power in the military courts as resulting from the Articles of 1916 which we have here considered. *People v. Denman* (Cal.) 177 Pac. 461; *Funk v. State*, 208 S. W. 509; *United States v. Hirsch* (D. C.) 254 Fed. 109.

It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit and that the court was right in so deciding and hence its judgment must be and it is

Affirmed.



## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(251 U. S. 567)

No. 223. Jose Lopez GARCIA, appellant, v. Orval P. TOWNSHEND, commanding officer, Camp Las Casas. Jan. 30, 1920. Appeal from the District Court of the United States for Porto Rico. Mr. Francis H. Dexter, of San Juan, P. R., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(252 U. S. 570)

No. 111. The UNION PACIFIC COAL COMPANY, petitioner, v. Mark A. SKINNER, Collector of Internal Revenue. March 22, 1920. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see *Skinner v. Union Pac. Coal Co.*, 249 Fed. 152, 161 C. C. A. 204. Mr. Henry W. Clark, of Aspen, Colo., for petitioner.

PER CURIAM. Affirmed with costs upon the authority of *Lynch v. Hornby*, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149, and cause remanded to the District Court of the United States for the District of Colorado.

(252 U. S. 571)

No. 227. McCAY ENGINEERING COMPANY, appellant, v. The UNITED STATES. March 22, 1920. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 642. George A. King, of Washington, D. C., for appellant. The Attorney General for the United States.

PER CURIAM. Affirmed by an equally divided Court. Mr. Justice McREYNOLDS took no part in the decision of this case.

(252 U. S. 571)

No. 241. The KANSAS CITY BOLT & NUT COMPANY, plaintiff in error, v. KANSAS CITY LIGHT & POWER COMPANY. March 22, 1920. In Error to the Supreme Court of the State of Missouri. For opinion below, see 275 Mo. 529, 204 S. W. 1074. Mr. Rees Turpin, of Kansas City, Mo., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309.

(252 U. S. 571)

No. 257. NEW ORLEANS LAND COMPANY, plaintiff in error, v. Willis J. ROUSSELL, Administrator, etc., et al. March 22, 1920. In Error to the Supreme Court of the State of Louisiana. For opinion below, see *Roussel v. New Orleans Land Co.*, 143 La. 1058, 79 South. 860. Mr. Charles Louque, of New Orleans, La., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 572)

No. 261. Edward C. MASON, as he is Trustee in Bankruptcy, etc., plaintiff in error, v. Thomas J. SHANNON et al. March 22, 1920. In Error to the Superior Court of the State of Massachusetts. Mr. Moses Williams, of Boston, Mass., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 589)

No. 284. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, plaintiff in error, v. H. T. TRUE, Jr. March 22, 1920. In Error to the Supreme Court of the State of Oklahoma. For opinion below, see 176 Pac. 758. Mr. Thomas B. Pryor, of Fort Smith, Ark., for plaintiff in error. Mr. Finis E. Riddle, of Tulsa, Okl., for defendant in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(252 U. S. 581)

No. 716. E. J. FRAZIER, petitioner, v. The STATE OF OREGON. March 22, 1920. For opinions below, see 180 Pac. 520, 184 Pac. 848. Messrs. Enos S. Stockbridge, of Baltimore, Md., Wm. P. Lord, of Portland, Or., and James K. Weatherford, of Albany, Or., for petitioner. Mr. George M. Brown, Atty. Gen., Mr. L. L. Ray, Dist. Atty., of Eugene, Or., and Mr. Arthur Clarke, Dist. Atty., of Corvallis, Or., for the State of Oregon. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied.

(252 U. S. 581)

No. 723. Alfred J. KEPPELMANN et al., Executors and Trustees, etc., petitioners, v. A. Mitchell PALMER, as Alien Property Custodian. March 22, 1920. For opinion below, see 108 Atl. 432. Mr. Edward M. Colie, of Newark, N. J., for petitioners. Mr. Thomas J. Spellacy, Asst. Atty. Gen., and Leonard B. Zeisler, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the Court of Chancery of the State of New Jersey denied.

(252 U. S. 582)

No. 724. Carl GOEPEL et al., partners, etc., petitioners, v. A. Mitchell PALMER, as Alien Property Custodian. March 22, 1920. Messrs. Martin V. Bergen and Ruby R. Vale, both of Philadelphia, Pa., for petitioners. Petition for a writ of certiorari to the Court of Chancery of the State of New Jersey denied.

(252 U. S. 582)

No. 735. Louis De F. MUNGER, petitioner, v. FIRESTONE TIRE & RUBBER COMPANY; and

No. 736. Louis De F. MUNGER, petitioner, v. The B. F. GOODRICH COMPANY. March 22, 1920. For opinion below, see 261 Fed. 921. Mr. William A. Redding, of New York City, for petitioner. Messrs. Charles Neave and William G. McKnight, both of Bos-

ton, Mass., for respondent, and Mr. Edward Rector, of Chicago, Ill., for the Firestone Co. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 582)

No. 747. **AMERICAN ORE RECLAMATION COMPANY**, petitioner, v. **DWIGHT & LLOYD SINTERING COMPANY, Inc.** March 22, 1920. For opinion below, see 263 Fed. 315. Mr. Henry B. Gayley, of New York City, for petitioner. Mr. Otto C. Wierum, Jr., of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 582)

No. 757. **EMPIRE FUEL COMPANY**, petitioner, v. **J. E. LYONS**. March 22, 1920. For opinion below, see 257 Fed. 890, 169 C. C. A. 40. Messrs. Arthur S. Dayton, of Philippi, W. Va., Melvin G. Sperry, of Clarksburg, W. Va., and Frank E. Wood, of Cincinnati, Ohio, for petitioner. Mr. Murray Seasongood, of Cincinnati, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(252 U. S. 582)

No. 770. **Carl H. RICHARDSON**, as Trustee, etc., petitioner, v. **THE GERMANIA BANK OF CITY OF NEW YORK**. March 22, 1920. For opinion below, see 263 Fed. 320. Mr. Carroll G. Walter, of New York City, for petitioner. Mr. Bernard Hershkopf, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 583)

No. 783. **S. J. LINDSEY**, Petitioner, v. **THE UNITED STATES OF America**. March 22, 1920. For opinion below, see 264 Fed. 94. Mr. A. Johnston Ackiss, of Norfolk, Va., for petitioner. Mr. William L. Frierson, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(252 U. S. 583)

No. 784. **The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY**, petitioner, v. **INDUSTRIAL COMMISSION OF STATE OF ILLINOIS** (Maria Kiley, Administratrix, etc.). March 22, 1920. For opinion below, see 290 Ill. 590, 125 N. E. 380. Messrs. Gardiner Lathrop, Homer W. Davis, and Sloane Turgeon, all of Chicago, Ill., for petitioner. Mr. Leo L. Donahoe, of Chicago, Ill. (Mr. Francis E. Croakin, of Chicago, Ill., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(252 U. S. 589)

No. 298. **UNION PACIFIC RAILROAD COMPANY et al.**, plaintiffs in error, v. **W. H. JENKINS et al.** March 24, 1920. In error to the Supreme Court of the State of Nebraska. Messrs. Charles H. Sloan, of Geneva, Neb., and William E. Flynn, of North Platte, Neb., for plaintiffs in error. Dismissed with costs pursuant to the 10th rule.

(252 U. S. 590)

No. 347. **NATIONAL SURETY COMPANY**, appellant, v. **THE UNITED STATES OF America** for the use of **AMERICAN SHEET METAL WORKS et al.** March 29, 1920. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 256 Fed. 77, 167 C. C. A. 319. Mr. William B. Grant, of New Orleans, La., for appellant. Dismissed with costs, and mandate granted, on motion of counsel for the appellant.

(252 U. S. 583)

No. 479. **The HOUSTON & TEXAS CENTRAL RAILROAD COMPANY**, petitioner, v. **The CITY OF ENNIS et al.** March 29, 1920. For opinion below, see 201 S. W. 256. Mr. H. M. Garwood, of Houston, Tex., for petitioner. Petition for a writ of certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas denied.

(252 U. S. 583)

No. 745. **Antonio Cisneros CHAPA**, petitioner, v. **THE UNITED STATES OF America**. March 29, 1920. For opinion below, see 261 Fed. 775. Messrs. Chambers, Watson & Wilson, of San Antonio, Tex., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 584)

No. 760. **The CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY**, petitioner, v. **NAAM LOOZE VENNOOT SCHAP, etc.** March 29, 1920. For opinion below, see 261 Fed. 269. Messrs. Frederick D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore, Md., for petitioner. Messrs. Charles R. Hickox, of New York City, Stuart S. Janney, of Baltimore, Md., and John M. Woolsey, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(252 U. S. 584)

No. 761. **The PENNSYLVANIA RAILROAD COMPANY**, petitioner, v. **NAAM LOOZE VENNOOT SCHAP, etc.** March 29, 1920. For opinion below, see 261 Fed. 269. Messrs. Frederick D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore, Md., for petitioner. Mr. James K. Symmers, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(252 U. S. 584)

No. 762. **The CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY**, petitioner, v. **Edwin DYASON**, master of **THE Steamship WELBECK HALL, etc.** March 29, 1920. For opinion below, see 261 Fed. 274. Messrs. Frederick D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore, Md., for petitioner. Mr. James K. Symmers, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.



(252 U. S. 534)

No. 763. The PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Edwin DYASON, master of THE steamship WELBECK HALL, etc. March 29, 1920. For opinion below, see 261 Fed. 274. Messrs. Frederick D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore, Md., for petitioner. Mr. James K. Symmers, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(252 U. S. 534)

No. 766. V. F. MILLER, petitioner, v. The UNITED STATES of America. March 29, 1920. For opinion below, see 261 Fed. 914. Messrs. Chambers, Watson & Wilson, Ed. Halton, and Samuel Belden, all of San Antonio, Tex., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 585)

No. 773. FRANCE & CANADA STEAMSHIP CORPORATION, petitioner, v. Konrad STORGARD. March 29, 1920. For opinion below, see 263 Fed. 545. Mr. Bertrand L. Pettigrew, of New York City, for petitioner. Mr. Silas B. Axtell, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 585)

No. 774. SOUTHWESTERN GAS & ELECTRIC COMPANY, petitioner, v. The CITY OF SHREVEPORT. March 29, 1920. For opinion below, see 261 Fed. 771. Messrs. Max Pam and Harry B. Hurd, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(252 U. S. 585)

No. 778. Alec ERICKSON, petitioner, v. JOHN A. ROEBLING'S SONS COMPANY OF NEW YORK. March 29, 1920. For opinion below, see John A. Roebling's Sons Co. of New York v. Erickson, 261 Fed. 986. Mr. Silas B. Axtell, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 585)

No. 787. Karl SANDGREN et al., petitioners, v. ULSTER STEAMSHIP COMPANY (Limited), owner and claimant, etc. March 29, 1920. For opinion below, see 262 Fed. 751. Mr. W. J. Waguespack, of New Orleans, La., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 65. Franklin SHAW et al., appellants, v. Franklin K. LANE, Secretary of the Interior; and

No. 405. Franklin K. LANE, Secretary of the Interior, et al., plaintiffs in error, v. The UNITED STATES of America ex rel. Allen L. NEWTON. March 30, 1920. See, also, 48 App. D. C. 547. Messrs. Charles A. Towne, of New York City, and Duane E. Fox, of Washington, D. C., for appellants. Messrs. C. Edward Wright and Charles D. Mahaffie, both of Washington, D. C., for appellee. Mr. Solicitor General King, of Atlanta, Ga., for Lane and others. John Barton Payne, present Secretary of the Interior, substituted as the party appellee in No. 65 and as one of the parties plaintiffs in error in No. 405, in the place of Franklin K. Lane, former Secretary of the Interior, on motion of Mr. Solicitor General King in that behalf.

No. 27, Original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. April 13, 1920. See, also, 252 U. S. 372, 40 Sup. Ct. 353, 64 L. Ed. —. Frederic A. Delano, Esq., of Chicago, Ill., is appointed Receiver, vice Jacob M. Dickinson, declined, on giving bond in the sum of \$100,000.

(252 U. S. 590)

No. 209. Louis C. TIFFANY, Sole Surviving Executor, etc., appellant, v. The UNITED STATES. April 19, 1920. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 640. Messrs. Simon Lyon and R. B. H. Lyon, both of Washington, D. C. for appellant. Mr. Solicitor General King, for the United States. Reversed, upon confession of error, and cause remanded for further proceedings in conformity with law, and mandate granted, on motion of Mr. Solicitor General King for the appellee.

(252 U. S. 574)

No. 233. The UNITED STATES, appellant, v. WAYNE COUNTY, KENTUCKY. April 19, 1920. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 417. The Attorney General, for appellant.

PER CURIAM. Affirmed upon the authority of (1) United States v. Cress, 243 U. S. 316, 329, 37 Sup. Ct. 380, 61 L. Ed. 746; United States v. Welch, 217 U. S. 333, 339, 30 Sup. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 185, 31 Sup. Ct. 162, 55 L. Ed. 165, 31 L. R. A. (N. S.) 1135; (2) St. Louis v. Western Union Tel. Co., 148 U. S. 92, 101, 13 Sup. Ct. 485, 37 L. Ed. 380; Western Union Tel. Co. v. Richmond, 224 U. S. 160, 169, 32 Sup. Ct. 449, 56 L. Ed. 710, and see Stockton v. Baltimore & New York R. Co., 32 Fed. 9; (3) Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(252 U. S. 575)

No. 263. B. T. BACKUS, plaintiff in error, v. NORFOLK SOUTHERN RAILROAD COMPANY. April 19, 1920. In error to the

Supreme Court of Appeals of the State of Virginia. Mr. Edward Baird, Jr., of Norfolk, Va., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 573)

No. 266. Mary WILLEM, a Creditor, etc., appellant, v. Dawson E. BRADLEY, Trustee, etc. April 19, 1920. Appeal from the District Court of the United States for the Southern District of Ohio. See, also, 39 Sup. Ct. 493. Mary Willem, in pro. per.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(252 U. S. 573)

No. 282. The METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY, et al., plaintiffs in error, v. Maclay HOYNE, State's Attorney, etc., et al.; and

No. 283. The METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY et al., plaintiffs in error, v. The SANITARY DISTRICT OF CHICAGO et al. April 19, 1920. In error to the Supreme Court of the State of Illinois. For opinions below, see 285 Ill. 246, 120 N. E. 748; Id., 285 Ill. 342, 120 N. E. 756. Messrs. Addison L. Gardner, of New York City, and Gilbert E. Porter, Timothy J. Scofield and Frank J. Loesch, all of Chicago, Ill., for plaintiffs in error. Messrs. George I. Haight and Edmund D. Adcock, both of Chicago, Ill., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat., 726 (Comp. St. § 1214).

(252 U. S. 395)

No. 287. F. R. GLASCOCK et al., plaintiffs in error, v. Ellis McDANIEL et al., minors, by J. O. Cravens, guardian. April 19, 1920. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 175 Pac. 737. See, also, 249 U. S. 600, 39 Sup. Ct. 257, 63 L. Ed. 796. Messrs. William B. Moore and George S. Ramsey, both of Muskogee, for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat., 726 (Comp. St. § 1214).

(252 U. S. 574)

No. 295. E. W. BLANCETT, plaintiff in error, v. The STATE OF NEW MEXICO. April 19, 1920. In error to the Supreme Court

of the State of New Mexico. For opinion below, see 24 N. M. 433, 174 Pac. 207. Mr. A. B. Renehan, of Santa Fe, N. M., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 572)

No. 297. QUEENS LAND & TITLE COMPANY et al., appellants, v. KINGS COUNTY TRUST COMPANY et al. April 19, 1920. Appeal from the District Court of the United States for the Eastern District of New York. For opinion below, see 255 Fed. 222. Messrs. Louis A. Seitz and William G. Cooke, both of New York City, for appellants. Messrs. Frank J. Hogan, of New York City, and George E. Brower, of Brooklyn, for appellees.

PER CURIAM. Affirmed with costs upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550, and see Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., this day decided, 252 U. S. 436, 40 Sup. Ct. 385, 64 L. Ed. —.

(252 U. S. 591)

No. 366. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, plaintiff in error, v. ROAD IMPROVEMENT DISTRICT NO. 1 OF PRAIRIE COUNTY, ARKANSAS. April 19, 1920. In Error to the Supreme Court of the State of Arkansas. For opinion below, see 209 S. W. 725. Messrs. Thomas S. Buzbee, of Little Rock, Ark., and Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(252 U. S. 591)

No. 367. MISSOURI PACIFIC RAILROAD COMPANY et al., plaintiffs in error, v. MONROE COUNTY ROAD IMPROVEMENT DISTRICT et al. April 19, 1920. In Error to the Supreme Court of the State of Arkansas. For opinion below, see 209 S. W. 728. Messrs. Thomas S. Buzbee, of Little Rock, Ark., and Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., for plaintiffs in error. Dismissed with costs, on motion of counsel for the plaintiffs in error.

(252 U. S. 574)

No. 423. CHICAGO & NORTHWESTERN RAILWAY COMPANY, plaintiff in error, v. Herman VAN DE ZANDE. April 19, 1920. In error to the Supreme Court of the State of Wisconsin. For opinion below, see 168 Wis. 628, 170 N. W. 259. See, also, 250 U. S. 661, 40 Sup. Ct. 10, 63 L. Ed. 1195. Mr. R. N. Van Doren, of Milwaukee, Wis., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of



the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(252 U. S. 590)

No. 502. SOUTHERN COTTON OIL COMPANY et al., appellants, v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY. April 19, 1920. Appeal from the District Court of the United States for the Eastern District of Arkansas. Messrs. W. E. Hemingway, G. B. Rose and J. F. Loughborough, all of Little Rock, Ark., for appellants. Dismissed with costs, per stipulation.

(252 U. S. 586)

No. 693. Benjamin HOROWITZ et al., plaintiffs in error, v. The UNITED STATES of America. April 19, 1920. For opinion below, see 262 Fed. 48. Petition for a writ of certiorari herein denied.

(252 U. S. 590)

No. 698. The DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY et al. v. Marie L. THOMPSON. April 19, 1920. On a certificate from the United States Circuit Court of Appeals for the Third Circuit. Dismissed per stipulation.

(252 U. S. 586)

No. 737. BARBER & COMPANY, Inc., petitioner, v. Steamship KNUTSFORD, Limited. April 19, 1920. For opinion below, see 261 Fed. 866. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 586)

No. 753. Arthur BAIN, petitioner, v. The UNITED STATES of America. April 19, 1920. For opinion below, see 262 Fed. 664. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(252 U. S. 396)

No. 758. Charles L. BAENDER, petitioner, v. The UNITED STATES of America. April 19, 1920. For opinion below, see 260 Fed. 832. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(252 U. S. 586)

No. 759. Webb JAY et al., petitioners, v. Frederick WEINBERG et al. April 19, 1920. For opinion below, see 262 Fed. 973. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(252 U. S. 587)

No. 769. Jessie C. WASHBURN et al., petitioners, v. E. N. GILLESPIE. April 19, 1920. For opinion below, see 261 Fed. 41. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(252 U. S. 587)

No. 772. Murle L. ROWE, as Trustee, etc., petitioner, v. James L. DROHEN et al. April 19, 1920. For opinion below, see 262 Fed. 15. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 577)

Nos. 779 and 780. The UNITED STATES, petitioner, v. NATIONAL SURETY COMPANY. April 19, 1920. For opinion below, see 262 Fed. 62. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(252 U. S. 587)

No. 785. Shelley B. HUTCHINSON, petitioner, v. William M. SPERRY et al. April 19, 1920. For opinion below, see 261 Fed. 133. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(252 U. S. 591)

No. 796. The NEW YORK EVENING POST COMPANY, petitioner, v. John Armstrong CHALONER. April 19, 1920. On petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 265 Fed. 204. Dismissed on motion of counsel for the petitioner.

(252 U. S. 587)

No. 799. Christian TJOSEVIG et al., petitioners, v. T. J. DONOHOE et al. April 19, 1920. For opinion below, see 262 Fed. 911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(252 U. S. 588)

No. 804. NEW YORK CENTRAL RAILROAD COMPANY, Claimant, etc., petitioner, v. John S. HOWELL et al. April 19, 1920. For opinion below, see Howell v. Delaware, L. & W. R. Co., 262 Fed. 119. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(252 U. S. 588)

No. 834. Elizabeth Denny GREGG, petitioner, v. Francis P. GARVAN, Alien Property Custodian; and

No. 835. A. J. KELLEY, Jr., et al., Trustees, etc., petitioners, v. Francis P. GARVAN, Alien Property Custodian. April 19, 1920. For opinion below, see 109 Atl. 777. Petition for writs of certiorari to the Supreme Court of the State of Pennsylvania denied.

(252 U. S. 577)

No. 836. H. Snowden MARSHALL, as Receiver, etc., petitioner, v. The PEOPLE of the State of New York. April 19, 1920. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(252 U. S. 572)

No. 541. The UNITED STATES of America et al., appellants, v. ALASKA STEAMSHIP COMPANY et al. March 22, 1920. Counsel requested to file briefs concerning the effect upon the issues herein involved resulting from the act of Congress terminating the Federal control of railroads and amending the act to regulate commerce in certain particulars, approved February 28, 1920. See 253 U. S. 113, 40 Sup. Ct. 448, 64 L. Ed. —.

(252 U. S. 523)

**PENN MUT. LIFE INS. CO. v. LEDERER,**  
Collector of Internal Revenue.

(Argued March 22 and 23, 1920. Decided  
April 19, 1920.)

No. 499.

**1. INTERNAL REVENUE § 7—MUTUAL LIFE  
INSURANCE COMPANY NOT ENTITLED TO EX-  
CLUSION FROM INCOME OF DIVIDENDS NOT  
USED TO PAY PREMIUMS.**

Under Revenue Act, § II, G (b), imposing a tax on the income of insurance companies and providing that life insurance companies shall not include as income in any year such portion of any actual premium received as shall have been paid back or credited to the policy holder or treated as an abatement of premiums within the year, and that all insurance companies may deduct sums other than dividends paid within the year on policy and annuity contracts, cash dividends paid to policy holders and not used by them during the year in payment of premiums cannot be deducted or excluded.

**2. INTERNAL REVENUE § 7—INSURANCE COM-  
PANIES NOT ENTITLED TO DEDUCT DIVIDENDS  
FROM INCOME.**

Revenue Act, § II, G (b), authorizing insurance companies to deduct from gross income sums other than dividends paid on policy and annuity contracts, is tantamount to a direction that dividends shall not be deducted.

**3. STATUTES § 217—CONSTRUCTION NOT AID-  
ED BY LEGISLATIVE HISTORY OF LATER ACT.**

While the legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction of such act, no aid can possibly be derived from the legislative history of another act passed nearly six years later.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Penn Mutual Life Insurance Company against Ephraim Lederer, Collector of Internal Revenue. A judgment for plaintiff (247 Fed. 559) was reversed by the Circuit Court of Appeals for the Third Circuit (258 Fed. 81, 169 C. C. A. 167), and defendant brings certiorari. Affirmed.

See, also, 250 U. S. 656, 40 Sup. Ct. 14, 63 L. Ed. 1192.

Mr. George Wharton Pepper, of Philadelphia, Pa., for petitioner.

Mr. Assistant Attorney General Frierson, for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] The Penn Mutual Life Insurance Company, a purely mutual legal reserve com-

\*524

pany which issues level premium insurance, brought this action in the District Court of the United States for the Eastern District

of Pennsylvania to recover \$6,865.03 which was assessed and collected as an income tax of 1 per cent. upon the sum of \$686,503, alleged to have been wrongly included as a part of its gross income, and hence also of its net income, for the period from March 1, 1913 to December 31, 1913. The latter sum equals the aggregate of the amounts paid during that period by the company to its policy holders in cash dividends which were not used by them during that period in payment of premiums. The several amounts making up this aggregate represent mainly a part of the so-called redundancy in premiums paid by the respective policy holders in some previous year or years. They are, in a sense, a repayment of that part of the premium previously paid which experience has proved was in excess of the amount which had been assumed would be required to meet the policy obligations (ordinarily termed losses) or the legal reserve and the expense of conducting the business.<sup>1</sup> The District Court allowed recovery of the full amount with interest. 247 Fed. 559. The Circuit Court of Appeals for the Third Circuit, holding that nothing was recoverable except a single small item, reversed the judgment and awarded a new trial. 258 Fed. 81, 169 C. C. A. 167. A writ of certiorari from this court was then allowed. 250 U. S. 656, 40 Sup. Ct. 14, 63 L. Ed. 1192.

Whether the plaintiff is entitled to recover depends wholly upon the construction to be given certain provisions in section II, G (b), of the Revenue Act of October 3, 1913, c. 16, § 38 Stat. 114, 172, 173. The act enumerates

\*525

among "the corporations upon which the income tax is imposed "every insurance company" other than "fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system." It provides—G (b), pp. 172-174—how the net income of insurance companies shall be ascertained for purposes of taxation, prescribing what shall be included to determine the gross income of any year, and also specifically what deductions from the ascertained gross income shall be made in order to determine the net income upon which the tax is assessed. Premium receipts are a part of the gross income to be accounted for.

In applying to insurance companies the system of income taxation in which the assessable net income is to be ascertained by

<sup>1</sup> The manner in which mutual level premium life insurance companies conduct their business, and the nature and application of dividends are fully set forth in Mutual Benefit Life Ins. Co. v. Herold (D. C.) 198 Fed. 199; Connecticut General Life Ins. Co. v. Eaton (D. C.) 218 Fed. 138; Connecticut Mutual Life Ins. Co. v. Eaton (D. C.) 218 Fed. 206.



making enumerated deductions from the gross income (including premium receipts) Congress naturally provided how, in making the computation<sup>2</sup>, repayment of the redundancy in the premium should be dealt with. In a mutual company, whatever the field of its operation, the premium exacted is necessarily greater than the expected cost of the insurance, as the redundancy in the premium furnishes the guaranty fund out of which extraordinary losses may be met, while in a stock company they may be met from the capital stock subscribed. It is of the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the

\*526

policy holder. Some payment to the \*policy holder representing such excess is ordinarily made by every mutual company every year; but the so-called repayment or dividend is rarely made within the calendar year in which the premium (of which it is supposed to be the unused surplus) was paid. Congress treated the so-called repayments or dividends in this way (page 173):

(a) Mutual fire companies "shall not return as income any portion of the premium deposits returned to their policy holders."

(b) Mutual marine companies "shall be entitled to include in deductions from gross income amounts repaid to policy holders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof."

(c) Life insurance companies (that is both stock and strictly mutual) "shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year."

(d) For all insurance companies, whatever their field of operation, and whether stock or mutual, the act provides that there be deducted from gross income "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts."

The government contends, in substance, for the rule that in figuring the gross income of life insurance companies, there shall be taken the aggregate of the year's net premium receipts made up separately for each policy holder.<sup>3</sup> The Penn Mutual Company con-

\*527

tends for the \*rule that in figuring the gross income there shall be taken the aggregate full premiums received by the company less the aggregate of all dividends paid by it to any policy holder by credit upon a premium or by abatement of a premium and also of all dividends whatsoever paid to any policy holder in cash, whether applied in payment of a premium or not. The noninclusion clause (c), above, excludes from gross income those premium receipts which were actually or in effect paid by applying dividends. The company seeks to graft upon the clause so restricted a provision for what it calls non-including, but which in fact is deducting, all cash dividends not so applied. In support of this contention the company relies mainly, not upon the words of the statute, but upon arguments which it bases upon the nature of mutual insurance, upon the supposed analogy of the rules prescribed in the statute for mutual fire and marine companies and upon the alleged requirements of consistency.

First. The reason for the particular provision made by Congress seems to be clear: Dividends may be made, and by many of the companies have been made largely, by way of abating or reducing the amount of the renewal premium.<sup>4</sup> Where the dividend is so made the actual premium receipt of the year is obviously only the reduced amount. But, as a matter of bookkeeping, the premium is

\*528

\*entered at the full rate and the abatement (that is, the amount by which it was reduced) is entered as a credit. The financial result both to the company and to the policy holders is, however, exactly the same whether the renewal premium is reduced by a dividend or whether the renewal premium remains unchanged, but is paid in part either by a credit or by cash received as a dividend. And the entries in bookkeeping would be substantially the same. Because the several ways of paying a dividend are, as between the company and the policy holder, financial equivalents, Congress, doubtless, concluded to make the incidents the same, also, as respects income taxation. Where the dividend was used to abate or reduce the full or gross premium, the direction to eliminate from the apparent premium receipts is

of credit of dividends, or by way of abatement of premium.

<sup>4</sup> The dividend provision of the Mutual Benefit Life Insurance Company involved in the Herold Case, supra, 193 Fed. 199, 204, was, in part: "After this policy shall have been in force one year, each year's premium subsequently paid shall be subject to reduction by such dividend as may be apportioned by the directors." The dividend provision in some of the participating policies involved in the Connecticut General Life Ins. Co. Case, supra, 218 Fed. 188, 192, was: "Reduction of premiums as determined by the company will be made annually beginning at the second year, or the insured may pay the full premium and instruct the company to apply the amount of reduction apportioned to him in any one of the following plans: [Then follow four plans.]"

<sup>2</sup> The percentage of the redundancy to the premium varies, from year to year, greatly, in the several fields of insurance, and likewise in the same year in the several companies in the same field. Where the margin between the probable losses and those reasonably possible is very large, the return premiums rise often to 90 per cent. or more of the premium paid. This is true of the manufacturers' mutual fire insurance companies of New England. See Report Massachusetts Insurance Commissioner (1913) vol. I, p. 16.

<sup>3</sup> A separate account is kept by the company with each policy holder. In that account there is entered each year the charges of the premiums payable and all credits either for cash payments or by way

aply expressed by the phrase "shall not include," used in clause (c) above. Where the premium was left unchanged, but was paid in part by a credit or cash derived from the dividend, the instruction would be more properly expressed by a direction to deduct those credits. Congress doubtless used the words "shall not include" as applied also to these credits because it eliminated them from the aggregate of taxable premiums as being the equivalent of abatement of premiums.

That such was the intention of Congress is confirmed by the history of the noninclusion clause (c), above. The provision in the Revenue Act of 1913, for taxing the income of insurance companies is in large part identical with the provision for the special excise tax upon them imposed by the Act of August 5, 1909, c. 6, § 38, 36 Stat. 112. By the latter act the net income of insurance companies was also to be ascertained by deducting from gross income "sums other than dividends, paid within the year on policy and renewal contracts"; but there was in that act no noninclusion clause whatsoever. The question arose whether the provision in the

act of 1913 identical with (c) \*above prevented using in the computation the reduced renewal premiums instead of the full premiums, where the reduction in the premium had been effected by means of dividends. In *Mutual Benefit Life Insurance Co. v. Herold*, 198 Fed. 199, decided July 29, 1912, it was held that the renewal premium as reduced by such dividends should be used in computing the gross premium; and it was said (page 212) that dividends so applied in reduction of renewal premiums "should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policy holder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and income of the invested funds of the company." On writ of error sued out by the government the judgment entered in the District Court was affirmed by the Circuit Court of Appeals on January 27, 1913 (201 Fed. 918, 120 U. C. A. 256), but that court stated that it refrained from expressing any opinion concerning dividends on full paid policies, saying that it did so "not because we wish to suggest disapproval, but merely because no opinion about these matters is called for now, as they do not seem to be directly involved." The noninclusion clause in the Revenue Act of 1913 (c) above, was doubtless framed to define what amounts involved in dividends should be "nonincluded," or deducted, and thus to prevent any controversy arising over the questions which had been raised under the act of 1909.<sup>5</sup> The petition for writ of

certiorari applied for by the government was not denied by this court until December 15, 1913 (231 U. S. 755, 34 Sup. Ct. 323, 58 L. Ed. 468); that is, after the passage of the act.

\*530  
"Second. It is argued that the nature of life insurance dividends is the same, whatever the disposition made of them, and that Congress could not have intended to relieve the companies from taxation to the extent that dividends are applied in payment of premiums and to tax them to the extent that dividends are not so applied. If Congress is to be assumed to have intended, in obedience to the demands of consistency, that all dividends declared under life insurance policies should be treated alike in connection with income taxation regardless of their disposition, the rule of consistency would require deductions more far-reaching than those now claimed by the company. Why allow so-called noninclusion of amounts equal to the dividends paid in cash but not applied in reduction of renewal premium and disallow so-called noninclusion of amounts equal to the dividends paid by a credit representing amounts retained by the company for accumulation or to be otherwise used for the policy holders' benefit? The fact is, that Congress has acted with entire consistency in laying down the rule by which in computing gross earnings certain amounts only are excluded; but the company has failed to recognize what the principle is which Congress has consistently applied. The principle applied is that of basing the taxation on receipts of net premiums, instead of on gross premiums. The amount equal to the aggregate of certain dividends is excluded, although they are dividends because by reason of their application the net premium receipts of the tax year are to that extent less. There is a striking difference between an aggregate of individual premiums, each reduced by means of dividends, and an aggregate of full premiums, from which it is sought to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year, but which relate to some other premiums which may have been received many years earlier. The difference between

\*531  
the two \*cases is such as may well have seemed to Congress sufficient to justify the application of different rules of taxation.

There is also a further significant difference. All life insurance has in it the element of protection. That afforded by fraternal beneficiary societies, as originally devised, had in it only the element of protection. There the premiums paid by the member were supposed to be sufficient, and only sufficient, to pay the losses which will fall during the current year, just as premiums in

<sup>5</sup> Substantially the same questions were involved, also, in *Connecticut General Life Ins. Co. v. Eaton*

(D. C.) 218 Fed. 188, and *Connecticut Mutual Life Ins. Co. v. Eaton* (D. C.) 218 Fed. 206, in which decisions were not, however, reached until the following year.



fire, marine, or casualty insurance are supposed to cover only the losses of the year or other term for which the insurance is written. Fraternal life insurance has been exempted from all income taxation; Congress having differentiated these societies, in this respect as it had in others, from ordinary life insurance companies. Compare *Royal Arcanum Supreme Council v. Behrend*, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182, 1 A. L. R. 966. But in level premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature of a savings deposit. Except where there are stockholders, the savings bank pays back to the depositor his deposit with the interest earned less the necessary expense of management. The insurance company does the same; the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the life insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited, that is, paid in premiums (including interest) and those who exceed the average age less than they deposited (including interest). The dividend of a life insurance company may be regarded as paying back part of these deposits called premiums. The dividend is made possible because the amounts paid in as premium

\*532

have earned \*more than it was assumed they would when the policy contract was made, or because the expense of conducting the business was less than it was then assumed it would be or because the mortality—that is, the deaths—in the class to which the policy holder belongs proved to be less than had then been assumed in fixing the premium rate. When for any or all of these reasons the net cost of the investment (that is, the right to receive at death or at the endowment date the agreed sum) has proved to be less than that for which provision was made, the difference may be regarded either as profit on the investment or as a saving in the expense of the protection. When the dividend is applied in reduction of the renewal premium, Congress might well regard the element of protection as predominant and treat the reduction of the premium paid by means of a dividend as merely a lessening of the expense of protection. But after the policy is paid up the element of investment predominates and Congress might reasonably regard the dividend substantially as profit on the investment.

The dividends, aggregating \$686,503, which the Penn Mutual Company insists should have been “nonincluded,” or more properly deducted, from the gross income, were, in part, dividends on the ordinary limited pay-

ment life policies which had been paid up. There are others which arose under policy contracts in which the investment feature is more striking; for instance, the Accelerative Endowment Policy or such special form of contract as the 25-year “6% Investment Bond” matured and paid March, 1913, on which the policy holder received besides dividends, interest, and a “share of forfeitures.” In the latter, as in “Deferred Dividend” and other semi-tontine policies, the dividend represents in part what clearly could not be regarded as a repayment of excess premium of the policy holder receiving the dividend. For the “share of the forfeiture” which he receives is the share of the redundancy in pre-

\*533

mium of other policy holders who \*did not persist in premium payments to the end of the contract period.

Third. The noninclusion clause here in question, (c) above, is found in section II G (b) in juxtaposition to the provisions concerning mutual fire and mutual marine companies, clauses (a) and (b) above. The fact that in three separate clauses three different rules are prescribed by Congress for the treatment of redundant premiums in the three classes of insurance would seem to be conclusive evidence that Congress acted with deliberation and intended to differentiate between them in respect to income taxation. But the company, ignoring the differences in the provisions concerning fire and marine companies respectively, insists that mutual life insurance rests upon the same principles as mutual fire and marine, and that as the clauses concerning fire and marine companies provide specifically for noninclusion in or deduction from gross income of all portions of premiums returned, Congress must have intended to apply the same rule to all. Neither premise nor conclusion is sound.

Mutual fire, mutual marine, and mutual life insurance companies are analogous in that each performs the service called insuring wholly for the benefit of their policy holders, and not like stock insurance companies in part for the benefit of persons who as stockholders have provided working capital on which they expect to receive dividends representing profits from their investment. In other words, these mutual companies are alike in that they are co-operative enterprises. But in respect to the service performed fire and marine companies differ fundamentally, as above pointed out, from legal reserve life companies. The thing for which a fire or marine insurance premium is paid is protection which ceases at the end of the term. If after the end of the term a part of the premium is returned to the policy holder, it is not returned as something purchased with the premium,

\*534

but as a part of the premium \*which was not required to pay for the protection; that is, the expense was less than estimated. On the other hand, the service performed in

level premium life insurance is both protection and investment. Premiums paid—not in the tax year, but perhaps a generation earlier—have earned so much for the co-operators that the company is able to pay to each not only the agreed amount, but also additional sums called dividends, and have earned these additional sums, in part at least, by transactions, not among the members, but with others, as by lending the money of the co-operators to third persons who pay a larger rate of interest than it was assumed would be received on investments. The fact that the investment resulting in accumulation or dividend is made by a co-operative as distinguished from a capitalistic concern does not prevent the amount thereof being properly deemed a profit on the investment. Nor does the fact that the profit was earned by a co-operative concern afford basis for the argument that Congress did not intend to tax the profit. Congress exempted certain co-operative enterprises from all income taxation, among others, mutual savings banks; but, with the exception of fraternal beneficiary societies, it imposed in express terms such taxation upon “every insurance company.”\*

The purpose of Congress to differentiate between mutual fire and marine insurance companies, on the one hand, and life insurance companies, on the other, is further manifested by this: The provision concerning return premiums in computation of the gross income of fire and marine insurance companies is limited in terms to mutual companies, whereas the noninclusion clause (c), above, relat-

\*535

ing to life insurance companies, applies whether the company be a stock or a mutual one. There is good reason to believe that the failure to differentiate between stock and mutual life insurance companies was not inadvertent. For while there is a radical difference between stock fire and marine companies and mutual fire and marine companies, both in respect to the conduct of the business and in the results to policy holders, the participating policy commonly issued by the stock life insurance company is, both in rights conferred and in financial results, substantially the same as the policy issued by a purely mutual life insurance company. The real difference between the two classes of life companies as now conducted lies in the legal right of electing directors and officers. In the stock company stockholders have that right; in the mutual companies the policy holders who are the members of the corporation.

\*The alleged unwisdom and injustice of taxing mutual life insurance companies while mutual savings banks were exempted had been strongly pressed upon Congress. Briefs and statements filed with Senate Committee on Finance on H. R. 3321—Sixty-Third Congress, First Session, vol. 3, pp. 1955-2094.

The Penn Mutual Company, seeking to draw support for its argument from legislation subsequent to the Revenue Act of 1913, points also to the fact that by the Act of September 8, 1916, c. 463, § 12, subsec. second, subd. c, 39 Stat. 756, 768 (Comp. St. § 6336d), the rule for computing gross income there provided for mutual fire insurance companies was made applicable to mutual employers' liability, mutual workmen's compensation, and mutual casualty insurance companies. It asserts that thereby Congress has manifested a settled policy to treat the taxable income of mutual concerns as not including premium refunds, and that, if mutual life insurance companies are not permitted to “exclude” them, these companies will be the only mutual concerns which are thus discriminated against. Casualty insurance, in its various forms, like fire and marine insurance, provide only protection, and the premium is wholly an expense. If such later legislation could be considered in construing the act of 1913, the conclusion to be drawn from it would be clearly the opposite of that urged. The later

\*536

act would tend to show that Congress \*persists in its determination to differentiate between life and other forms of insurance.

Fourth. It is urged that in order to sustain the interpretation given to the noninclusion clause by the Circuit Court of Appeals (which was, in effect, the interpretation set forth above) it is necessary to interpolate in the clause the words “within such year,” as shown in italics in brackets, thus:

“And life insurance companies shall not include as income in any year such portion of any actual premiums received from any individual policy holder [*within such year*] as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year.”

What has been said above shows that no such interpolation is necessary to sustain the construction given by the Circuit Court of Appeals. That court did not hold that the permitted noninclusion from the year's gross income is limited to that portion of the premium received within the year which, by reason of a dividend, is paid back within the same year. What the court held was that the noninclusion is limited to that portion of the premium which, although entered on the books as received, was not actually received within the year, because the full premium was, by means of the dividend, either reduced or otherwise wiped out to that extent. Nor does the government contend that any portion of a premium not received within the tax year shall be included in computing the year's gross income. On the other hand, what the company is seeking is not to have “nonincluded” a part of the premiums which were actually received within the year, or which appear as matter of bookkeeping to



have been received, but actually were not. It is seeking to have the aggregate of premiums actually received within the year reduced by an amount which the company paid

\*537

out within the year, and which it paid out mainly on account of premiums received long before the tax year. What it seeks is not a noninclusion of amounts paid in, but a deduction of amounts paid out.

[2] If the terms of the noninclusion clause (c), above, standing alone, permitted of a doubt as to its proper construction, the doubt would disappear when it is read in connection with the deduction clause (d), above. The deduction there prescribed is of "the sums other than dividends paid within the year on policy and annuity contracts." This is tantamount to a direction that dividends shall not be deducted. It was argued that the dividends there referred to are "commercial" dividends like those upon capital stock, and that those here involved are dividends of a different character. But the dividends which the deduction clause says, in effect, shall not be deducted, are the very dividends here in question; that is, dividends "on policy and annuity contracts." None such may be deducted by any insurance company except as expressly provided for in the act, in clauses quoted above (a), (b), and (c); that is, clauses (a), (b), and (c) are, in effect, exceptions to the general exclusion of dividends from the permissible deductions as prescribed in clause (d) above.

[3] In support of the company's contention that the interpolation of the words "within the year" is necessary in order to support the construction given to the act by the Circuit Court of Appeals we are asked to consider the legislative history of the Revenue Act of 1918 (enacted February 24, 1919, [40 Stat. 1057, c. 18]), and specifically to the fact that in the bill as introduced in and passed by the House the corresponding section—233 (a); Comp. St. Ann. Supp. 1919, § 6336½p contained the words "within the taxable year," and that these words were stricken out by the Conference Committee (Report No. 1037, Sixty-Fifth Congress, Third Session). The legislative history of an act may, where the meaning of the words used

\*538

is doubtful, be resorted to as an aid to construction. *Caminetti v. United States*, 242 U. S. 470, 490, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168. But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question. Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate.

We find no error in the judgment of the Circuit Court of Appeals.

It is affirmed.

(252 U. S. 553)

CANADIAN NORTHERN RY. CO. v.  
EGGEN.

(Argued March 1, 1920. Decided April 19, 1920.)

No. 281.

1. LIMITATION OF ACTIONS ⇨4(1)—LIMITATION OF ONE YEAR FOR PERSONAL INJURY ACTIONS NOT UNDULY SHORT.

A limitation of one year for actions for personal injuries is not unduly short, having regard to the likelihood of the dispersing of witnesses, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence often turn.

2. CONSTITUTIONAL LAW ⇨207(3)—NONRESIDENT OF STATE NOT ENTITLED TO PRECISELY SAME RIGHTS IN THE COURTS AS RESIDENTS.

Const. art. 4, § 2, providing that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, does not entitle a nonresident of a state to precisely the same rights in the courts of such states as resident citizens have if he is given access to the courts upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have.

3. CONSTITUTIONAL LAW ⇨45—ADEQUACY AND REASONABLENESS OF TERMS ON WHICH NONRESIDENTS ARE PERMITTED TO SUE IS A JUDICIAL QUESTION.

The adequacy and reasonableness of the terms on which nonresidents of a state are given access to its courts are to be determined by the courts, and ultimately by the United States Supreme Court.

4. CONSTITUTIONAL LAW ⇨207(3)—LIMITATION OF ACTIONS ⇨4(2)—EXCEPTION IN FAVOR OF RESIDENTS RESPECTING LIMITATION OF ACTIONS ARISING OUTSIDE OF THE STATE IS VALID.

Gen. St. Minn. 1913, § 7709, providing that, when a cause of action arises outside the state and is barred by the laws of the place where it arose, no action thereon shall be maintained unless plaintiff be a citizen of the state, who has owned the cause of action ever since it accrued, does not violate Const. U. S. art. 4, § 2, as applied to a cause of action for personal injuries, on which the laws of the country where it arose allowed one year in which to bring an action.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by Gus Eggen against the Canadian Northern Railway Company. A judgment for defendant was reversed by the Circuit Court of Appeals for the Eighth Circuit (*Eggen v. Canadian Northern Ry. Co.*, 255 Fed. 937, 167 C. C. A. 229), and defendant brings certiorari. Reversed, and judgment of the District Court affirmed.

See, also, *Canadian Northern Ry. Co. v. Eggen*, 249 U. S. 594, 39 Sup. Ct. 259, 63 L. Ed. 793.

Mr. Wm. D. Mitchell, of St. Paul, Minn., for petitioner.

Mr. Ernest A. Michel, of Minneapolis, Minn., for respondent.

\*558

\*Mr. Justice CLARKE delivered the opinion of the Court.

The only question presented for decision in this case is as to the validity of section 7709 of the Statutes of Minnesota (General Statutes of Minnesota 1913), which reads:

"When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The Circuit Court of Appeals, reversing the

\*559

District Court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to article 4, section 2, of the Constitution of the United States, which declares that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The action was commenced in the District Court of the United States for the District of Minnesota, Second Division, by the respondent, a citizen of North Dakota, against the petitioner, a corporation organized under the laws of the Dominion of Canada, to recover damages for personal injuries sustained by him on November 29, 1913, when employed by the petitioner as a switchman in its yards at Humboldt, in the province of Saskatchewan. The respondent, a citizen and resident of North Dakota, went to Canada and entered the employ of the petitioner as a switchman a short time prior to the accident complained of. He remained in Canada for six months after the accident and then returned to live in North Dakota. He commenced this action on October 15, 1915, almost two years after the date of the accident. By the laws of Canada, where the cause of action arose, an action of this kind must be commenced within one year from the time injury was sustained. If the statute of Minnesota, above quoted, is valid, it is applicable to the action, which, being barred in Canada, cannot be maintained in Minnesota by a nonresident plaintiff. If, however, the statute is invalid, the general statute of limitations of Minnesota, allowing a period of six years within which to commence action, would be applicable. The record properly presents the claim of the petitioner that the Circuit Court of Appeals erred in holding the statute involved unconstitutional and void.

It is plain that the act assailed was not

enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents of Minnesota.

\*560

\*It has been in force ever since the state was admitted into the Union in 1858; it is in terms precisely the same as those of several other states, and in substance it does not differ from those of many more. It gives a nonresident the same rights in the Minnesota courts as a resident citizen has, for a time equal to that of the statute of limitations where his cause of action arose. If a resident citizen acquires such a cause of action after it has accrued, his rights are limited precisely as those of the nonresident are, by the laws of the place where it arose. If the limitation of the foreign state is equal to or longer than that of the Minnesota statute, the nonresident's position is as favorable as that of the citizen.

It is only when the foreign limitation is shorter than that of Minnesota, and when the nonresident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign state (which happens to be the respondent's case), that inequality results—and for this we are asked to declare a statute unconstitutional which has been in force for 60 years.

This court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution (article 4, § 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in *Corfield v. Coryell*, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230 (the first federal case in which this clause was considered), saying:

"We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental." *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394; *Blake v. McClung*, 172 U. S. 239, 248, 19 Sup. Ct. 165, 43 L. Ed. 432; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 155, 28 Sup. Ct. 34, 52 L. Ed. 143.

In the *Corfield* Case the court included in a partial list of such fundamental privileges "the right of a citizen of one state \* \* \* to institute and maintain actions of any kind in the courts of" another.

\*561

\*The state of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect.

[1-3] This is not disputed, nor can it be fairly claimed that the limitation of one year is unduly short, having regard to the likelihood of the dispersing of witnesses to accidents such as that in which the respondent



was injured, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn. Thus, the holding of the Circuit Court of Appeals comes to this, that the privilege and immunity clause of the Constitution guarantees to a nonresident precisely the same rights in the courts of a state as resident citizens have, and that any statute which gives him a less, even though it be an adequate, remedy is unconstitutional and void.

Such a literal interpretation of the clause cannot be accepted.

From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many states may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of

\*562

other states. \* \* \* It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states." *Blake v. McClung*, 172 U. S. 239, 256, 19 Sup. Ct. 165, 172 (43 L. Ed. 432).

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. Ed. 365; *Tennessee v. Sneed*, 96 U. S. 69,

74, 24 L. Ed. 610; *Antoni v. Greenhow*, 107 U. S. 769, 774, 2 Sup. Ct. 91, 27 L. Ed. 468.

A like result to that which we are announcing was reached with respect to similar statutes, in *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806; by the Circuit Court of Appeals, Second Circuit, in *Aultman & Taylor Co. v. Syme*, 79 Fed. 238, 24 C. C. A. 539; in *Klotz v. Angle*, 220 N. Y. 347, 116 N. E. 24; and in *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 325, 19 N. E. 625, 627 (2 L. R. A. 636).

In this last case the Court of Appeals of New York pertinently says:

\*563

"A construction of the constitutional limitation [the one we are considering] which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and nonresidents in legal proceedings and other matters."

[4] The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

(252 U. S. 338)

CUYAHOGA RIVER POWER CO. v.  
NORTHERN OHIO TRACTION &  
LIGHT CO. et al.

(Argued March 17, 1920. Decided April 19, 1920.)

No. 102.

1. CONSTITUTIONAL LAW §129—POWER COMPANY BY INCORPORATION HELD TO ACQUIRE NO CONTRACT RIGHTS TO LANDS INCLUDED IN DEVELOPMENT SCHEME.

A hydroelectric power company, incorporated under Gen. Code Ohio, §§ 10128, 10134, did not, by filing its articles of incorporation, specifying the streams across which dams were to be built and maintained, acquire contract rights, protected by the federal Constitution, to have lands embraced in its subsequently adopted plan for the development and sale of power subjected to its public use, rights of way, and franchises, exclusive of all other persons or corporations.

2. COURTS **284**—FEDERAL QUESTION IN SUBSTANCE NECESSARY TO GIVE JURISDICTION.

To give jurisdiction to the federal courts, where diversity of citizenship does not exist, there must be a federal question, not in mere form, but in substance, and not in mere assertion, but in essence and effect.

3. CONSTITUTIONAL LAW **129**—ACTION OF COMPANY NOT ATTRIBUTABLE TO STATE AS IMPAIRMENT OF CONTRACT RIGHTS.

The acts or claims of a traction company whose incorporation antedated plaintiff's incorporation could not be attributed to the state as an impairment of plaintiff's contract rights under its charter.

4. CONSTITUTIONAL LAW **129**—INCORPORATION OF COMPANY NOT IMPAIRMENT OF CONTRACT RIGHTS OF SIMILAR EXISTING CORPORATION.

The incorporation of a power company under the general laws of the state was not an impairment of the contract rights of a power company previously incorporated under the same general laws.

5. CONSTITUTIONAL LAW **129**—COMMISSION'S APPROVAL OF CONVEYANCE BY POWER COMPANY NOT IMPAIRMENT OF CONTRACT OF ANOTHER POWER COMPANY CLAIMING THE RIGHT TO USE THE LANDS.

Where a power company acquired title to lands which another power company claimed the right to acquire, as covered by its plan for the development of power, an approval by the Public Utilities Commission, of a conveyance of the first power company's lands, rights, and franchises to a traction company, whether a necessary condition to the conveyance or not, did not impair the second power company's asserted contract right to acquire such lands.

Appeal from the District Court of the United States for the Northern District of Ohio.

Suit by the Cuyahoga River Power Company against the Northern Ohio Traction & Light Company and another. From a decree dismissing the bill for want of jurisdiction and equity, plaintiff appeals. Affirmed.

**\*389**

\*The appeal is direct to this court, the laws and Constitution of the United States being asserted to be involved. Upon motion of defendants (appellees) the bill was dismissed for want of jurisdiction and equity. Its allegations, therefore, become necessary to consider.

Plaintiff (appellant) was incorporated as a hydroelectric power company on May 29, 1903, for the purposes specified in the act of the Legislature of Ohio, passed in 1904, and contained in sections 10128 and 10134 of the Ohio General Code of 1910.

The articles of incorporation filed May 29, 1903, with the Secretary of State, specified the streams across which the dams were to be built and maintained; that is, the

streams in controversy, the Big Cuyahoga river and certain of its tributaries.

By said incorporation a contract was duly made and entered into between the state and plaintiff whereby the state granted to plain-

**\*390**

tiff a right of way over and along the Cuyahoga river between the designated termini and a vested right and franchise to construct, maintain, and operate, within the limits of the right of way, a hydroelectric plant for the development of electric current and energy from the waters of the river, together with a right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire property necessary to carry out and perform the grant and make it effective. The grant has not been repealed.

The grants were accepted and are of great value, and upon the faith of that the capital stock of plaintiff was subscribed for, and large expenditures and investments made and obligations incurred, including bonds of the par value of \$150,000, and stock to the value of \$210,000, all in a large part prior to December, 1910.

On June 4, 1908, plaintiff by its board of directors adopted a specific and detailed plan for the development of the power and sale of the same to the public, and definitely located its proposed improvements for that purpose upon specifically described lands, which had previously been entered upon and surveyed by its engineers, and then and there declared and resolved that the parcels of land were necessary to carry out the purpose of the plaintiff's organization and that it thereby appropriated and demanded them for its corporate purposes. The parcels of land described in the resolution include all that were necessary for the purpose of the corporation, and the location of the improvement so fixed by the resolution was permanent and irrevocable, and conclusive upon plaintiff and all other persons, except as the same might be altered by further act of the state.

June 5, 1908, the plaintiff instituted a suit in the court of proper jurisdiction, to condemn or appropriate in accordance with the statutes of Ohio, the parcels of land mentioned in the resolution, and the persons owning the same were made parties. The suit

**\*391**

was continuously pending until a date subsequent to July 18, 1911, but at the instance and request of one of the owners of the parcels and of the Northern Ohio Traction & Light Company, called the Traction Company, the suit was not pressed for trial against them until January, 1911, up to which date certain negotiations in regard to the improvement of the company were proposed, but finally terminated in the refusal of the owner of the land and the Traction Company to sell the land to plaintiff.



December 20, 1910, pending the suit and negotiations, the landowner executed a deed of the lands to the Northern Realty Company, conveying to it a fee-simple title.

January 20, 1911, after unsuccessful negotiations with the Realty Company, plaintiff instituted another suit for the condemnation of the land, which suit was prosecuted in the probate court (the court of jurisdiction) and is now pending in the Supreme Court of the United States, undetermined, to which court it was carried by a writ of error from the Court of Appeals of Ohio.

January 31, 1911, and while the suit above mentioned was pending, the Realty Company conveyed the land, that had been conveyed to it, to the Northern Ohio Power Company, and the latter company conveyed that and other land which it had acquired, and all of its properties, rights, and franchises, to the Traction Company, and the latter company entered upon the lands, and now holds possession of them and of the improvements erected thereon.

Prior to January 20, 1911, no location or improvement upon the lands above designated was made for the purpose of utilizing them in the development of power and they were actually employed for no use whatsoever, except a small wooden structure intended and occasionally used for dances and roller skating, a small portion of which structure was within all of the parcels.

Between January 31, 1911, and February

<sup>\*392</sup>

24, 1914, there <sup>\*</sup>was erected upon the lands designated a power house and other appliances for the generation of electric current and energy by means of steam power, also a dam, a powerhouse, and other appliances for the generation of electric current and energy by the flow and fall of the waters of the river.

(There is an allegation of the capacity of the plants which may be omitted. Other allegations in regard to the various companies and the powers they possess and do not possess also may be omitted. It is only necessary to say that it is alleged that the Power Company had not, and the Traction Company has not, power to use the designated lands or the waters of the river to operate the steam power plant and the hydroelectric plant, or for the development of such powers, and therefore neither company had power to exercise eminent domain for such purposes, though asserting its right and intention to do so, and, if it should do so, it would invade and injure rights of plaintiff, "inflicting upon the plaintiff and the persons interested therein a continuing and irreparable injury, for which there is no adequate remedy at law.")

From and after the time of the adoption of the resolution of June 4, 1908, the designated parcels of land were subjected to plaintiff's public use and its rights and franchises, ex-

clusive of all other persons and corporations; that such rights and franchises were granted to plaintiff by the state of Ohio under and by authority of plaintiff's contract with the state, and for the protection of which plaintiff is entitled to, and claims, the protection of the Constitution of the United States and of the amendments thereof, as well as section 5 of article 13 of the Constitution of the state of Ohio.

The effect and result of the Traction Company's use of the designated parcels of land and of the waters of the river is an appropriation by it of the rights and franchises of plaintiff and the deprivation of its property

<sup>\*393</sup>

for private <sup>\*</sup>use without compensation and without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and an impairment of the contract of plaintiff with the state of Ohio within the meaning of article 1 of the Constitution of the United States.

Plaintiff has at all times, and since its incorporation, actively and diligently and in good faith proceeded to carry out and accomplish its corporate purpose.

In April, 1909, the plaintiff amended its resolution of June 4, 1908, and enlarged its proposed plant and the output and product thereof and obtained a grant from the state over the additional portion or section of the Cuyahoga river, so as to carry out the amended plan, and it provides for the utilization of the designated parcels of land necessary to the plaintiff's rights and franchises. (The additional capacity is alleged.)

The prayer is that plaintiff's rights and franchises be established and adjudged; that the proceedings complained of be decreed a violation of the plaintiff's rights, and of the Constitution of Ohio and the Constitution of the United States, and a taking of its property without due process of law, and that an injunction be granted against their further exercise, that defendants be required to remove the structures and devices already erected upon the lands, or to convey them to the plaintiff, and that a receiver be appointed to take possession of the lands and structures. An accounting is also prayed, and general relief.

Mr. Carroll G. Walter, of New York City, for appellant.

Messrs. John E. Morley, of Cleveland, Ohio, J. S. Clark, of Philadelphia, Pa., and S. H. Tolles and Thomas H. Hogsett, both of Cleveland, Ohio, for appellees.

<sup>\*394</sup>

<sup>\*</sup>Mr. Justice McKENNA after stating the case as above, delivered the opinion of the Court.

As we have said, a motion was made to dismiss the bill. The grounds of the motion were that there was no jurisdiction in the court, the controversy not arising under the Constitution and laws of the United States,

and that the bill did not state facts sufficient to constitute a cause of action against defendants or either of them.

There is an assertion, in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill. Putting the question concretely, or rather the contention which constitutes its foundation, the District Court said:

"The contention of the plaintiff is that by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the state, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the state of Ohio giving it the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company."

The court rejected the contention holding that it was not tenable under the law and

\*395

Constitution of Ohio. To \*sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, and, as an inference from them, declared that it was—

"not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from the water sheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes."

And further:

"The terms of section 19, article 1, of the Ohio Constitution militate against the plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the state, the Traction Company's right to dominion over its holdings is inviolate. *Wagner v. Railway Co.*, 38 Ohio St. 32."

The court also cited *Sears v. City of Akron*, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. Ed. 688 (then just delivered), expressing the view that, if the case had been brought to the court's attention sooner, a less extended discussion of the motion to dismiss could have been made.

[1] We concur with the District Court, both in its reasoning and its deductions from the cited cases. The contention of plaintiff is certainly a bold one, and seemingly erects

into a legal principle that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation. Of course, there must be a first step in every project as well as a last step, and in enterprises like those we are considering there may be attainment under the local law of a right invulnerable to opposing assertion. And this plaintiff contends. To be explicit it contends that as against the Power Company and the Traction Company, they being its competitors in the same field of enterprise, its resolution of June 4, 1908, constituted an appropriation of the waters of the river, and a definite location of "its proposed improvement for that purpose upon specifically described parcels of land previously entered upon and surveyed by its engineers." Wheth-

\*396

er the \*resolution had that effect under the Ohio laws we are not called upon to say. Indeed, we are not so much concerned with the contention as the ground of it. Plaintiff alleges as a ground of it, a contract with the state of Ohio, by its incorporation, "wherein and whereby said state duly granted to the plaintiff a right of way over and along said Cuyahoga river" between the designated termini, with the rights and franchises which we have mentioned, together "with the right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant and make the same effective" and that the acts of defendants, having legislative sanction of the state, impair plaintiff's contract.

It is manifest, therefore, that the determining and effective element of the contention is the charter of the state, and plaintiff has proceeded in confidence in it against adverse adjudications. One of the adjudications is *Sears v. City of Akron*, supra. The elemental principle urged here was urged there; that is, there was urged there, as here, that the charter of the company constituted a contract with the state, and that the contract was to a conclusive effect executed by the resolution of the board of directors of plaintiff on June 4, 1908, such resolution constituting an appropriation of the lands described therein, they being necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's charter and resolution. The principle was rejected, and it was decided that the incorporation of plaintiff was not a contract by the state with reference to the riparian rights, and that if plaintiff acquired riparian rights, or specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's



contention here, and it is manifest, if plaintiffs have any rights, they \*are against defendants as rival companies, or against them as landowners, rights under the charter, not by the charter, considered as a contract express or implied. The District Court recognized the distinction and confined its decree accordingly. The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, it (plaintiff) could prevent an owner of property within its territory from occupying or using the same without condemnation proceedings being had, and compensation paid or secured for such property.

[2] The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners, and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a federal court unless there be involved a federal question, and a federal question, not in mere form, but in substance, and not in mere assertion, but in essence and effect. The federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that, it has no rights or property to be taken; that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. *Wagner v. Railway Co.*, 38 Ohio St. 32.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be divested of nothing, and it must rely upon the assertion of a contract and the impairment of it by the state, or some agency of the state, exercising the state's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of

plaintiff's brief, that the rights \*it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (Exhibit A) became, and ever since have been, subjected to plaintiff's public use, and subject to its rights of way and franchises, exclusive of all other persons or corporations, that the Traction Company asserts and claims that by reason of purchases of the rights and fran-

chises of the Northern Ohio Power Company sanctioned by the orders of the Public Utilities Commission as set forth in the bill, and the construction by it (the Traction Company) of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws; that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

[3-5] It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may or does claim cannot be attributed to the state (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the state did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff, is another question. There remains then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. Section 614—60, Page & Adams Ohio

\*399

General \*Code. The order conferred no new rights upon the Power Company, which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless, and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands, and diversity of citizenship not existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

Mr. Justice DAY and Mr. Justice CLARKE took no part in the consideration or decision of this case.

(252 U. S. 496)

## BOEHMER v. PENNSYLVANIA R. CO.

(Argued March 10 and 11, 1920. Decided April 19, 1920.)

No. 191.

1. MASTER AND SERVANT 111(1)—RAILROAD CAR HANDHOLDS ON DIAGONALLY OPPOSITE CORNERS SUFFICIENT.

Safety Appliance Act 1893, § 4 (Comp. St. § 8608), making it unlawful to use any railroad car in interstate commerce not provided with secure grabirons or handholds in the ends and sides of each car, is complied with by providing secure and adequate handholds on the diagonally opposite corners of the car, without equipping all four corners therewith.

2. CERTIORARI 68—SUPREME COURT WILL NOT ANALYZE EVIDENCE, WHERE LOWER COURTS CONCUR ON QUESTION OF NEGLIGENCE.

Where it was the concurrent judgment of the District Court and Circuit Court of Appeals that a railway company was not negligent in failing to warn a brakeman concerning the use of cars equipped with handholds only at two diagonal corners, the Supreme Court will not enter upon a minute analysis of the evidence.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by Michael U. Boehmer against the Pennsylvania Railroad Company. A judgment for defendant was affirmed by the Circuit Court of Appeals for the Second Circuit (252 Fed. 553, 165 C. C. A. 3), and plaintiff brings certiorari. Affirmed.

\*497

\*Messrs. E. C. Brandenburg, of Washington, D. C., and Thomas A. Sullivan, of Buffalo, N. Y., for petitioner.

Mr. Frederic D. McKenney, of Washington, D. C., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Relying upon the federal Employers' Liability Act (Comp. St. §§ 8657-8665), petitioner sought damages for personal injuries sustained by him November 8, 1915, while employed by respondent as brakeman. He claimed that the railroad was negligent in using a freight car not equipped with handholds or grabirons on all four outside corners, and

also in failing to instruct him that he would be required to work about cars not so equipped. The car in question had secure and adequate handholds on the diagonally opposite corners. Being of opinion that this equipment sufficed to meet the commands of the statute and that under the circumstances disclosed, failure to instruct the petitioner concerning possible use of such car did not constitute negligence, the trial court directed verdict for respondent.

The Circuit Court of Appeals affirmed the consequent judgment. 252 Fed. 553, 165 C. C. A. 3.

\*498

\*[1] Section 4 of the Safety Appliance Act of 1893 (27 Stat. 531 [Comp. St. § 8608]), provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the act of 1893 was designed for the safety of employes and specified grabirons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we cannot say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad operations; and having considered these the courts below ruled against petitioner's theory.

[2] Likewise we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. *Chicago Junction Railway Co. v. King*, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173.

The judgment is Affirmed.



(252 U. S. 450)

## CAMERON et al. v. UNITED STATES.

(Argued January 29 and 30, 1920. Decided April 19, 1920.)

No. 205.

## 1. PUBLIC LANDS ¶49—ESTABLISHMENT BY PRESIDENT OF COLORADO CANYON RESERVE AUTHORIZED BY STATUTE; "OBJECT OF SCIENTIFIC INTEREST."

Under Act June 8, 1906 (Comp. St. §§ 5278-5281), authorizing the President to declare historic landmarks and other objects of historic or scientific interest on government lands, national monuments, and reserve as a part thereof parcels of land confined to the smallest area compatible with the proper care and management of such objects, the President was authorized to establish a monument reserve embracing the Grand Canyon of the Colorado river; it being an "object of scientific interest."

## 2. MINES AND MINERALS ¶17(1)—TEST OF SUFFICIENT DISCOVERY OF MINERAL STATED.

Under Rev. St. § 2320 (Comp. St. § 4615), providing that no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located, the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.

## 3. MINES AND MINERALS ¶40—SECRETARY OF INTERIOR MAY DETERMINE VALIDITY OF CLAIM AND DECLARE IT VOID.

Under Rev. St. § 441 (Comp. St. § 681), giving the Secretary of the Interior supervision of the public lands, including mines, section 453 (section 699), providing that the Commissioner of the General Land Office shall perform, under the direction of such Secretary, all executive duties concerning public lands, and section 2478 (section 5120), giving the Commissioner under the direction of the Secretary authority to enforce and carry into execution the provisions of that title, the Secretary, after proper notice and upon adequate hearing, may determine whether a mining claim is valid, and if it be found invalid, declare it null and void, and the fact that the department has no means of executing its decision, such as dispossessing the locator, is immaterial.

## 4. MINES AND MINERALS ¶40—FINDING OF SECRETARY OF INTERIOR ON QUESTIONS OF FACT CONCLUSIVE.

The findings of the Secretary of the Interior that the tract covered by a mineral location was not mineral land, and that there had been no sufficient discovery, are conclusive, in the absence of fraud or imposition.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against Ralph H. Cameron and others. A decree for the government was affirmed by the Circuit Court of Appeals for the Ninth Circuit (250 Fed.

943, 163 C. C. A. 193), and defendants appeal. Affirmed.

Messrs. Wm. C. Prentiss, of Washington, D. C., and Joseph E. Morrison, of Phoenix, Ariz., for appellants.

Mr. Assistant Attorney General Nebeker, for appellee.

\*454

\*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to enjoin Ralph H. Cameron and others from occupying, using for business purposes, asserting any right to, or interfering with the public use of, a tract of land in Arizona, approximately 1,500 feet long and 600 feet wide, which Cameron is claiming as a lode mining claim, and to require the defendants to remove therefrom certain buildings, filth and refuse placed thereon in the course of its use by them as a livery stable site and otherwise. In the District Court there was a decree for the United States, and this was affirmed by the Circuit Court of Appeals. 250 Fed. 943, 163 C. C. A. 193.

The tract is on the southern rim of the Grand Canyon of the Colorado, is immediate-

\*455

ly adjacent to the railroad \*terminal and hotel buildings used by visitors to the canyon and embraces the head of the trail,<sup>1</sup> over which visitors descend to and ascend from the bottom of the canyon. Formerly it was public land and open to acquisition under the public land laws. But since February 20, 1893, it has been within a public forest reserve<sup>2</sup> established and continued by proclamations of the President under the Acts of March 3, 1891, § 24, 26 Stat. 1095, 1103 (Comp. St. § 5121), and June 4, 1897, c. 2, 30 Stat. 34-36 (Comp. St. §§ 5123-5134), and since January 11, 1908, all but a minor part of it has been within a monument reserve<sup>3</sup> established by a proclamation of the President under the act of June 8, 1906, c. 3060, 34 Stat. 225 (Comp. St. §§ 5278-5281). The forest reserve remained effective after the creation of the monument reserve, but in so far as both embraced the same land the monument reserve became the dominant one. 35 Stat. 2175. The inclusion of the tract in the forest reserve withdrew it from the operation of the public land laws, other than the mineral land law; and the inclusion of the major part of it in the monument reserve withdrew that part from the operation of the mineral land law, but there was a saving clause in respect of any "valid" mining claim theretofore acquired. The United States still has the paramount legal title to the tract, and also has the full beneficial ownership if

<sup>1</sup> The Bright Angel Trail.

<sup>2</sup> Originally the Grand Canyon Forest Reserve and now the Tusayan National Forest.

<sup>3</sup> Called the Grand Canyon National Monument.

Cameron's asserted mining claim is not valid.

[1] The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific in-

\*456

terest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

The defendants also insist that in holding the United States entitled to the relief sought the courts below gave undue effect and weight to decisions of the Secretary of the Interior dealing with Cameron's asserted claim and pronouncing it invalid. Rightly to appreciate and dispose of this contention requires a further statement.

The claim in question is known as the Cape Horn lode claim and was located by Cameron in 1902 after the creation of the forest reserve and before the creation of the monument reserve. To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located, Rev. Stat. § 2320 (Comp. St. § 4615); *Cole v. Ralph*, 252 U. S. 286, 40 Sup. Ct. 321, 64 L. Ed. —; and to bring the claim within the saving clause in the withdrawal for the monument reserve the discovery must have preceded the creation of that reserve.

Cameron applied to the Land Department for the issue to him of a patent for the claim and similarly sought patents for other claims embracing other portions of the trail into the canyon. A protest was interposed charging that the land was not mineral, that there had been no supporting mineral discoveries and that the claims were located and used for purposes not contemplated by the mineral land law; and the Secretary of the Interior directed that a hearing be had in the local land office to enable the parties concerned—the protestant, Cameron and the government—to produce evidence bearing on the questions thus presented. *Grand Canyon Ry. Co. v. Cameron*, 35 Land Dec. 495; *Id.*, 36 Land Dec. 66. After due notice the hearing was

\*457

had, Cameron fully participating in it. This was shortly after the creation of the monument reserve. In due course the evidence was laid before the Commissioner of the General Land Office and he concluded therefrom that the claims were not valuable for mining purposes, and therefore were invalid.

The matter was then taken before the Secretary of the Interior and that officer rendered a decision in which, after reviewing the evidence, he said:

"It is not pretended that the applicant has as yet actually disclosed any body of workable ore of commercial value; nor does the evidence reveal such indications and conditions as would warrant the belief or lead to the conclusion that valuable deposits are to be found, save, apparently, in the case of the Magician lode claim. With that possible exception, the probabilities of such deposits occurring are no stronger or more evident at the present time than upon the day the claims were located. The evidence wholly fails to show that there are veins or lodes carrying valuable and workable deposits of gold, silver, or copper, or any other minerals within the limits of the locations. Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities."

And further:

"It follows from the foregoing that each of Cameron's applications for patent \* \* \* must be rejected and canceled, and it is so ordered.

"It is the further result of the evidence, and the department holds, that the several mining locations, with the apparent exception of the Magician lode claim, do not stand upon such disclosures or indications of valuable mineral in rock in place therein, prior to the establishment of the national monument and the withdrawal of the lands therein embraced, as to bring them within the saving clause of the executive order. The right of Cameron to continue possession or exploration of those claims

\*458

\*is hereby denied, and the land covered thereby is declared to be and remain part of the Grand Canyon National Monument, as if such locations had not been attempted."

Directions were given for a further hearing respecting the Magician claim, but this is of no moment here.

That decision was adhered to on a motion for review, and in a later decision denying a renewed application by Cameron for a patent for the claim here in question the Secretary said:

"As the result of a hearing had after the creation of the national monument the department expressly found that no discovery of mineral had been made within the limits of the Cape Horn location, and that there was no evidence before the department showing the existence of any valuable deposits or any minerals within the limits of the location. \* \* \* So far as the portion of the claim included within the exterior limits of the national monument is concerned, no discovery which would defeat the said monument can have been made since the date of the previous hearing in this case, nor do I find that one is claimed to have been made since the former decision in any part of the alleged location."

After and notwithstanding these decisions Cameron asserted an exclusive right to the possession and enjoyment of the tract, as if



the lode claim were valid; and he and his co-defendants, who were acting for or under him, continued to occupy and use the ground for livery and other business purposes, and in that and other ways obstructed its use by the public as a part of the reserves. In this situation, and to put an end to what the government deemed a continuing trespass, pre-empture and public nuisance, the present suit was brought.

The courts below ruled that the decisions of the Secretary of the Interior should be taken as conclusively determining the non-mineral character of the land and the absence of an adequate mineral discovery, and also as

\*459

\*showing that the matter before the Secretary was not merely the application for a patent but also the status of the claim—whether it was valid or was wanting in essential elements of validity, and whether it entitled Cameron to the use of the land as against the public and the government. As before stated, the defendants complain of that ruling. The objections urged against it are, first, that the Secretary's decisions show that he proceeded upon a misconception of what under the law constitutes an adequate mineral discovery, and, second, that although the Secretary had ample authority to determine whether Cameron was entitled to a patent, he was without authority to determine the character of the land or the question of discovery, or to pronounce the claim invalid.

[2] As to the first objection little need be said. A reading of each decision in its entirety, and not merely the excerpts to which the defendants invite attention, makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. That is not a novel or mistaken test, but is one which the Land Department long has applied and this court has approved. *Chrisman v. Miller*, 197 U. S. 313, 322, 25 Sup. Ct. 468, 49 L. Ed. 770.

[3] The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say "naked proposition" because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practiced against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.

By general statutory provisions the exe-

\*460

cution of the \*laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the

department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stat. §§ 441, 453, 2478 (Comp. St. §§ 681, 699, 5120); *United States v. Schurz*, 102 U. S. 378, 395, 26 L. Ed. 167; *Lee v. Johnson*, 116 U. S. 48, 52, 6 Sup. Ct. 249, 29 L. Ed. 570; *Knight v. United Land Association*, 142 U. S. 161, 177, 181, 12 Sup. Ct. 258, 35 L. Ed. 974; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074.

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 639 (39 L. Ed. 737), where in giving effect to a decision of the Secretary of the Interior canceling a pre-emption claim theretofore passed to cash entry, but still unpatented, this court said:

"The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll v. Safford*, 3 How. 441 [11 L. Ed. 671]; *Witherspoon v. Duncan*, 4 Wall. 210 [18 L.

\*461

Ed. 339]. The \*government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department."

And to the same effect is *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 209 (42 L. Ed. 591), where in giving effect to a decision of the Secretary canceling a swamp land selection by the state of Michigan, theretofore approved, but as yet unpatented, it was said:

"It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question

whether or not such title has passed. *Cornelius v. Kessel*, 128 U. S. 456 [9 Sup. Ct. 122, 32 L. Ed. 482]; *Orchard v. Alexander*, 157 U. S. 372, 383 [15 Sup. Ct. 635, 39 L. Ed. 737]; *Parsons v. Venzke*, 164 U. S. 89 [17 Sup. Ct. 27, 41 L. Ed. 360]. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed."

True, the mineral land law does not in itself confer such authority on the Land Department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the Land Department. This is a necessary conclusion from this court's decisions. By an act of 1848 the title to public land in Oregon then occupied as missionary stations, not exceeding 640 acres in any instance, was confirmed to the several religious associations maintaining those stations, but the act made no provision for determining where the stations were, by whom they were maintained or the area occupied. The Land Department proceeded to a determination of

\*462

these questions in the \*exercise of its general authority, and in *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 166, 167, 15 Sup. Ct. 779, 784 (39 L. Ed. 931), where that determination was challenged as to a particular tract, it was said:

"While there may be no specific reference in the act of 1848 of questions arising under this grant to the Land Department, yet its administration comes within the scope of the general powers vested in that department. \* \* \* It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary."

And in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 308, 23 Sup. Ct. 692, 696 (47 L. Ed. 1064), where a claimant asserting a full equitable title under the lieu land provision of the Forest Reserve Act of 1897 (Comp. St. §§ 5123-5134), questioning the authority of the Land Department to inquire into and pass on the validity of his claim and sought to have it recognized and enforced by a suit in equity, it was said:

"There can be, as we think, no doubt that the general administration of the Forest Reserve Act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The statute of 1897 does not in terms refer any question that

might arise under it to that department, but the subject-matter of that act relates to the relinquishment of land in the various forest reservations to the United States, and to the selection of lands, in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the

\*463

administration of \*the laws regarding its public lands. Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject."

There is in the mineral land law a provision referring to the court's controversies between rival mineral claimants arising out of conflicting mining locations (*Rev. Stat. §§ 2325, 2326* [Comp. St. §§ 4622, 4623]), but it does not reach or affect other controversies, and so is without present bearing (*Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337, 356, et seq., 25 Sup. Ct. 266, 49 L. Ed. 501).

It is rightly conceded that in the case of a conflict between a mining location and a homestead claim the department has authority to inquire into and determine the validity of both and, if the mining location be found invalid and the homestead claim valid, to declare the former null and void and to give full effect to the latter; and yet it is insisted that the department is without authority, on a complaint preferred in the public interest, to inquire into and determine the validity of a mining location, and, if it be found invalid to declare it of no effect and recognize the rights of the public. We think the attempted distinction is not sound. It has no support in the terms of the mineral land law, is not consistent with the general statutory provisions before mentioned, and if upheld would encourage the use of merely colorable mining locations in the wrongful private appropriation of lands belonging to the public.

Instances in which this power has been exercised in respect of mining locations are shown in the *Yard Case*, 38 Land Dec. 59, and the *Nichols-Smith Case* (on rehearing) 46 Land Dec. 20; instances in which its exercise has received judicial sanction are found in *Lane v. Cameron*, 45 App. D. C. 404, and *Cameron v. Bass*, 19 Ariz. 246, 168 Pac. 645, and an instance in which its existence received substantial, if not decisive, recognition by this court is found in *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 220, 223, 234, 24 Sup. Ct. 632, 48 L. Ed. 944.

\*464

\*The argument is advanced that the department necessarily is without authority to pronounce a mining location invalid, because it has within itself no means of executing its decision, such as dispossessing the locator. But this is not a proper test of the existence of the authority, for the department is without the means of executing most of its decisions in the sense suggested. When it issues



a patent it has no means of putting the grantee in possession, and yet its authority to issue patents is beyond question. When it awards a tract to one of two rival homestead claimants it has no means of putting the successful one in possession or the other one out, and yet its authority to determine which has the better claim is settled by repeated decisions of this court. And a similar situation exists in respect of most of the claims or controversies on which the department must pass in regular course. Its province is that of determining questions of fact and right under the public land laws, of recognizing or disapproving claims according to their merits and of granting or refusing patents as the law may give sanction for the one or the other. When there is occasion to enforce its decisions in the sense suggested, this is done through suits instituted by the successful claimants or by the government, as the one or the other may have the requisite interest.

[4] Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. *Catholic Bishop of Nesqually v. Gibbon*, supra; *Burfenning v. Chicago*, St. Paul, etc., Ry. Co., 163 U. S. 321, 323, 16 Sup. Ct. 1018, 41 L. Ed. 175. Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below.

\*465

\*Of other complaints made by the defendants, it suffices to say that, in our opinion, the record shows that the government was entitled to the relief sought and awarded.

Decree affirmed.

(252 U. S. 533)

ESTATE OF P. D. BECKWITH, Inc., v.  
COMMISSIONER OF PATENTS.

(Argued and Submitted Jan. 23, 1920. Decided April 19, 1920.)

No. 178.

1. TRADE-MARKS AND TRADE-NAMES § 3(4)—  
EXCLUSIVE USE OF DESCRIPTIVE WORDS CAN-  
NOT BE OBTAINED.

The law will not secure to any person the exclusive use of a trade-mark, consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade.

2. TRADE-MARKS AND TRADE-NAMES § 3(4)—  
WORDS HELD DESCRIPTIVE AS APPLIED TO  
HEATERS AND FURNACES.

The words "Moistair Heating System" are descriptive, as applied to heaters and furnaces claimed to impart moisture to the air in the process of heating.

3. TRADE-MARKS AND TRADE-NAMES § 3(4)—  
MARK CONSISTING IN PART OF DESCRIPTIVE  
WORDS MAY BE REGISTERED, WHEN ACCOM-  
PANIED BY DISCLAIMER.

Under Act Feb. 20, 1905, § 5, as amended by Act Jan. 8, 1913 (Comp. St. § 9490), providing that no mark shall be refused registration as a trade-mark on account of its nature, unless it consists of certain prohibited matter, provided that no mark which consists "merely" in descriptive words or devices shall be registered, a trade-mark consisting of descriptive words used in a described manner of association with non-descriptive words and as a definitely positioned part of an entirely fanciful and arbitrary design or seal, cannot be denied registration when accompanied by a disclaimer of the descriptive words except in the precise relation and association in which they appear, nor can elimination of such descriptive words, thereby changing the mark as previously used, be required as a condition of registration.

Mr. Justice McReynolds dissenting.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Application in the Patent Office for the registration of a trade-mark by the Estate of P. D. Beckwith, Incorporated. A decision of the Commissioner of Patents, granting registration on conditions, was affirmed by the Court of Appeals for the District of Columbia (48 App. D. C. 110), and the petitioner brings certiorari. Reversed.

\*539

\*Mr. Harry C. Howard, of Kalamazoo, Mich., for petitioner.

Mr. Assistant Attorney General Davis, for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

The petitioner, a corporation, filed an application in the Patent Office for the registration of a trade-mark, which is described as follows:

"A design like a seal, comprising the head of an Indian chief surmounting a scroll bearing his name, 'Doe-Wah-Jack' and surrounded by a circle, outside of which appeared the words 'Round Oak' and 'Moistair Heating System' in a circle, and the whole being surrounded by a wreath of oak leaves."

It will be useful to reproduce the drawing filed with this application:



It was averred that the petitioner had used the mark for more than 18 months before the

\*540

application \*was made by applying it to "hot-air and combined hot-air and hot-water heaters and furnaces by having the same cast into the metals of which the systems were constructed."

The Commissioner found that the mark did not conflict with any other that was registered, and that the petitioner was entitled to the exclusive use of it excepting the words "Moistair Heating System." It was ordered that the mark might be registered if the expected words, objectionable because descriptive, were "erased" or "removed" from it, but that the filing of a disclaimer would not suffice to secure registration.

Not satisfied with this result, the petitioner appealed to the Court of Appeals for the District of Columbia, and its judgment affirming the decision of the Commissioner of Patents is before us for review.

The ground of both decisions is that the words "Moistair Heating System" are merely descriptive of a claimed merit of the petitioner's system—that in the process of heating moisture is added to the air—and that one person may not lawfully monopolize the use of words in general use which might be used with equal truthfulness to describe another system of heating. For this reason it was held that the case falls within the proviso of the Registration Act of 1905, declaring that no mark consisting merely in words or devices which are descriptive of the goods with which they are used or of the character or quality of such goods shall be registered under the terms of the act. Act Feb. 20, 1905, § 5, 33 Stat. 725, amended by Act Jan. 8, 1913, 37 Stat. 649 (Comp. St. § 9490).

No question of patent right, or of unfair competition, or that the design of the trademark is so simple as to be a mere device or contrivance to evade the law and secure the registration of non-registrable words, is involved. *Nairn Linoleum Co. v. Ringwalt Linoleum Works*, 46 App. D. C. 64, 69.

\*541

\*This statement makes it apparent that the question presented for decision is: Whether the applicant may lawfully register the words "Moistair Heating System," when combined with the words "Round Oak," as a part of its purely fanciful and arbitrary trade-mark design, as shown in the drawing filed, and when claim to exclusive use of the words apart from the mark shown in the drawing is disclaimed on the record.

An account of the process of decision, in the Patent Office and in the Court of Appeals, by which the result in this case was arrived at, as it appears in the brief of the Commissioner of Patents, is suggestive and useful. From this we learn that, when a mark has been presented for registration consisting merely (only) of descriptive words or devices, registration has been uniformly refused. When "composite" marks—such as contain

both registrable and nonregistrable matter—have been presented for registry with features in them which conflicted with earlier marks, registered by other than the applicant, the complete rejection, "eradication," of the conflicting portions has been uniformly required before registry was allowed. But where there was no such conflict, and the only objection was that descriptive words were used, the practice of the Patent Office prior to the decision, in 1909, of *Johnson v. Brandau*, 32 App. D. C. 348, was to permit the registration of marks containing such words, where they were associated with registrable words or were a part of an arbitrary or fanciful design or device; it being considered not necessary to delete the descriptive matter, even when it was an essential part of the composite trade-mark as it had been used by the applicant, provided it was clearly not susceptible of exclusive appropriation under the general rules of law. After the decision of *Johnson v. Brandau*, 32 App. D. C. 348, a practice grew up in the Patent Office, not provided for in the statute, of allowing an applicant to disclaim objectionable

\*542

descriptive words in cases where to require their actual removal would result in so changing the mark that it would not readily be recognized as that shown in the drawing or specimen filed with the application. The customary form of such disclaimer was a statement filed that no claim was made to the designated words, as, for example, "Moistair Heating System," apart from the mark shown in the drawing—this was interpreted as meaning that only when taken in connection with the remaining features of the mark did the applicant make claim to their exclusive use. *Ex parte Illinois Seed Co.*, 219 O. G. 931.

Such disclaimer became a part of the applicant's statement in the record and necessarily formed a part of the certificate of registration as it would appear in the copies of it furnished to the applicant and the public, pursuant to section 11 of the act (Comp. St. § 9496).

Then came the decisions in *Fishbeck Soap Co. v. Kleeno Manufacturing Co.*, 44 App. D. C. 6, and *Nairn Linoleum Co. v. Ringwalt Linoleum Works*, 46 App. D. C. 64, which, says the Commissioner of Patents, were understood as disapproving the practice of disclaimer, and since they were rendered, registration of merely descriptive matter has not been allowed in any form, but its actual deletion from the trade-mark drawing has been required, with, however, an apparent exception in the Case of *Rinsburger*, 8 T. M. Repts. 567, 128 MS. Dec. 141. The judgment we are considering, requiring, as it does, the "elimination" of the descriptive words, shows that the Commissioner correctly interpreted these two decisions of the Court of Appeals.

It is apparent from this rehearsal that the Commissioner of Patents has promptly and cordially accepted for his guidance the deci-



sions of the Court of Appeals, and, although he avoids a controversial attitude in his brief and gives a colorless history of the practice

\*543

of his office, \*still it is manifest that, in this case and in others, the court has very radically changed that practice with respect to permitting registry of composite trade-marks, and that its decisions have turned upon the construction of the second proviso, referred to, in the fifth section of the Registration Act, which is made the basis of the judgment we are reviewing.

The Registration Act of 1905 (33 Stat. 724), amended in 1906 (34 Stat. 168) and in 1909 (35 Stat. 627) and in 1913 (37 Stat. 649 [Comp. St. § 9485 et seq.]), without changing the substantive law of trade-marks, provided, in the manner prescribed, for the registration of marks (subject to special exceptions) which, without the statute, would be entitled to legal and equitable protection, and the case before us calls chiefly for the construction of the provisions of section 5 of that act (Comp. St. § 9490), which, so far as here involved, are as follows:

"No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class *shall be refused registration* as a trade-mark on account of the nature of such mark unless," etc.

"Provided, that *no mark which consists \* \* \* merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, \* \* \* shall be registered* under the terms of this act."

[1] It was settled long prior to the Trade-Mark Registration Act that the law would not secure to any person the exclusive use of a trade-mark consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade; this for the reason that the function of a trade-mark is to point distinctively, either by its own meaning or by association, to the origin or ownership of the wares to which it is applied, and words merely descriptive of qualities, ingredients, or characteristics, when used alone, do not do this. Other like goods, equal to them

\*544

in all respects, may be manufactured or \*dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public. *Canal Co. v. Clark*, 13 Wall. 311, 322, 323, 324, 20 L. Ed. 581; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 54, 25 L. Ed. 993; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 222, 2 Sup. Ct. 436, 27 L. Ed. 706; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 547, 11 Sup. Ct. 396, 34 L. Ed. 997; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U.

S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536.

[2, 3] Thus the proviso quoted, being simply an expression in statutory form of the prior general rule of law that words merely descriptive are not a proper subject for exclusive trade-mark appropriation, if the application in this case had been to register only the words "Moistair Heating System," plainly it would have fallen within the terms of the prohibition, for they are merely descriptive of a claimed property or quality of the petitioner's heating system—that by it moisture is imparted to the air in the process of heating. But the application was not to register these descriptive words "merely," alone and apart from the mark shown in the drawing, but in a described manner of association with other words, "Round Oak," which are not descriptive of any quality of applicant's heating system, and as a definitely positioned part of an entirely fanciful and arbitrary design or seal, to which the Commissioner found the applicant had the exclusive right.

Since the proviso prohibits the registration not of merely descriptive words but of a "trade-mark which consists \* \* \* merely" (only) of such words—the distinction is substantial and plain—we think it sufficiently clear that such a composite mark as we have here does not fall within its terms. In this connection it must be noted that the require-

\*545

ment of the statute that \*no trade-mark shall be refused registration, except in designated cases, is just as imperative as the prohibition of the proviso against registration in cases specified.

While there is no specific provision for disclaimers in the trade-mark statute, the practice of using them is commended to our judgment by the statement of the Commissioner of Patents that, so far as known, no harm came to the public from the practice of distinguishing, without deleting, nonregistrable matter in the drawing of the mark as registered, when a statement, forming a part of the record, was required that the applicant was not making claim to an exclusive appropriation of such matter except in the precise relation and association in which it appeared in the drawing and description.

It seems obvious that no one could be deceived as to the scope of such a mark, and that the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it. It seems obvious, also, that to require the deletion of descriptive words must result often in so changing the trade-mark sought to be registered from the form in which it had been used in actual trade that it would not be recognized as the same mark as that shown in the drawing which the statute requires to be filed with the application, or in the specimens produced as actually used, and therefore registration would lose much, if not all, of its

value. The required omission might so change the mark that in an infringement suit it could be successfully urged that the registered mark had not been used,—and user is the foundation of registry. Section 2 (Comp. St. § 9487). Of this last the case before us furnishes an excellent example. To strike out "Moistair Heating System" from the applicant's trade-mark would so change its appearance that its value must be largely lost as designating to prior purchasers or users the origin of the heating system to which it was applied.

The commercial impression of a trade-mark

\*546

is derived \*from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety (Johnson v. Brandau, supra), and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly affect its value. Of course, refusal to register a mark does not prevent a former user from continuing its use; but it deprives him of the benefits of the statute, and this should not be done if it can be avoided by fair, even liberal, construction of the act, designed as it is to promote the domestic and foreign trade of our country.

Thus the case comes to this: That the Commissioner found that the trade-mark presented for registration did not conflict with any theretofore registered, and there is no suggestion of unfair practice in the past or contemplated in the future; that it had been used for 18 months in the form proposed for registry; that the words ordered to be stricken out from the drawing are descriptive, but the mark does not consist "merely" in such words, but is a composite of them with others, and with an arbitrary design which, without these words, both the Commissioner and the court found to be registrable; that the language of the statute, that no mark not within its prohibitions or provisos shall be denied registration, is just as imperative as the prohibitory words of the proviso; and, very certainly, that a disclaimer on the part of applicant that no claim is made to the use of the words "Moistair Heating System" apart from the mark as shown in the drawing and as described, would preserve to all others the right to use these words in the future to truthfully describe a like property or result of another system, provided only that they be not used in a trade-mark which so nearly resembles that of the petitioner "as to be likely to cause confusion in the mind of the public or to deceive purchasers" when applied "to merchandise of the same descriptive properties." Section 5.

\*547

\*Such being the ultimate facts of this controversy, we cannot doubt that the Court of Appeals fell into error in ruling that the words "Moistair Heating System" must be "eliminated" from the trade-mark of the ap-

plicant as it had been theretofore used, and that the requirement of the act of Congress for the registration of trade-marks would be fully complied with if registration of it were permitted with an appropriate declaration on the part of the applicant that no claim is made to the right to the exclusive use of the descriptive words, except in the setting and relation in which they appear in the drawing, description, and samples of the trade-mark filed with the application.

It results that the judgment of the Court of Appeals must be  
Reversed.

Mr. Justice McREYNOLDS dissents.

(253 U. S. 12)

MAGUIRE v. TREFRY, Tax Com'r of  
Commonwealth of Massachusetts.

(Argued March 24, 1920. Decided April 26, 1920.)

No. 280.

CONSTITUTIONAL LAW — 283—TAXATION —  
104—TAX ON INCOME FROM SECURITIES HELD  
IN TRUST OUTSIDE THE STATE DOES NOT DENY  
DUE PROCESS.

St. Mass. 1916, c. 269, § 9, taxing the income of a resident of the state from a trust administered under the laws of another state in securities in the possession of the trustee in such other state does not deny due process of law in violation of Const. U. S. Amend. 14, as subjecting to taxation property beyond the limits and outside the jurisdiction of the state, as the beneficiary has an equitable right, title and interest, distinct from the legal ownership.

Mr. Justice McReynolds dissenting.

In Error to the Superior Court of the State of Massachusetts.

Proceeding by Emily M. Maguire against William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts. By direction of the Supreme Judicial Court of Massachusetts (230 Mass. 503, 120 N. E. 162), judgment was entered, granting the petitioner insufficient relief, and she brings error. Affirmed.

\*13

\*Mr. Richard W. Hale, of Boston, Mass., for plaintiff in error.

Mr. Wm. Harold Hitchcock, of Boston, Mass., for defendant in error.

Mr. Justice DAY delivered the opinion of the Court.

Massachusetts has a statute providing for a tax upon incomes. Gen. Stats. Mass. 1916, c. 269. In the act imposing the tax it is provided:

"If an inhabitant of this commonwealth receives income from one or more executors, ad-



ministrators or trustees, none of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees." Section 9.

The plaintiff in error is a resident of the state of Massachusetts, and was taxed upon income from a trust created by the will of one Matilda P. MacArthur formerly of Philadelphia. The plaintiff in error under the will of the decedent was the beneficiary of a trust thereby created. The securities were held in trust by the Girard Trust Company of Philadelphia. Those which were directly taxable to the trustee were held exempt from taxation in Massachusetts under the terms

\*14

of the statute of that state. The securities the income from which was held taxable in Massachusetts consisted of the bonds of three corporations and certain certificates of the Southern Railway Equipment Trust. These securities were held in the possession of the trustee in Philadelphia. The trust was being administered under the laws of Pennsylvania. The Supreme Judicial Court of Massachusetts held the tax to be valid. 230 Mass. 503, 120 N. E. 162.

Of the nature of the tax the Chief Justice of Massachusetts, speaking for the Supreme Judicial Court, said:

"The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates v. Boston*, 5 Cush. [Mass.] 93, at page 99: 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

We see no reason to doubt the correctness of this view of the nature and effect of the Massachusetts statute, and shall accept it for the purpose of considering the federal

\*15

\*question before us, which arises from the contention of the plaintiff in error that the imposition of the tax was a denial of due process of law within the protection of the Fourteenth Amendment to the federal Con-

stitution, because, it is alleged, the effect of the statute is to subject property to taxation which is beyond the limits and outside the jurisdiction of the state. To support this contention the plaintiff in error relies primarily upon the decision of this court in *Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. In that case we held that tangible, personal property, permanently located in another state than that of the owner, where it had acquired a situs, and was taxed irrespective of the domicile of the owner—was beyond the taxing power of the state, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the Fourteenth Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the state of the owner's residence. In that case this court in the opinion of Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. 199 U. S. 211, 26 Sup. Ct. 40, 50 L. Ed. 150, 4 Ann. Cas. 493.

It is true that in some instances we have held that bonds and bills and notes although evidences of debt have come to be regarded as property which may acquire a taxable situs at the place where they are kept, which may be elsewhere than at the domicile of the owner. These cases rest upon the principle that such instruments are more than mere evidences of debt, and may be taxed in the jurisdiction where located, and where they receive the protection of local law and authority. *Blackstone v. Miller*, 188 U. S. 189, 206, 23 Sup. Ct. 277, 47 L. Ed. 439; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, 585. At the last term we held in *De Ganay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042, that stocks and bonds issued by domestic corporations, and mort-

\*16

gages secured \*on domestic real estate, although owned by an alien non-resident, but in the hands of an agent in this country with authority to deal with them, were subject to the Income Tax Law of October 3, 1913, 38 Stat. 166.

In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another state.

In *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 Sup. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124, we held that a bank deposit of a resident of Kentucky in the bank of another state, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Transit Co. v. Kentucky*, supra, was distinguished and the principle was affirmed that the state of the owner's domicile might tax

the credits of a resident although evidenced by debts due from residents of another state. This is the general rule recognized in the maxim "*mobilia sequuntur personam*," and justify, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application and may yield to the exigencies of particular situations. But we think it is applicable here.

It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. "The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others." 2 Story's Equity (11th Ed.) § 964. It is this

<sup>\*17</sup> property right belong\*ing to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state which are held taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558.

We find no error in the judgment and the same is

Affirmed.

Mr. Justice McREYNOLDS dissenting.

(253 U. S. 17)

WARD et al. v. BOARD OF COUNTY COM'RS OF LOVE COUNTY, OKL.

(Submitted March 11, 1920. Decided April 26, 1920.)

No. 224.

1. CONSTITUTIONAL LAW ☞100—TAXATION ☞193—INDIANS' EXEMPTION FROM TAXATION HELD VESTED PROPERTY RIGHT WHICH CONTINUED, NOTWITHSTANDING STATUTE TO CONTRARY.

Under Act June 28, 1898, c. 517, providing that lands allotted thereunder should be nontaxable while the title remained in the original allottee, but not to exceed 21 years, the exemption was a vested right protected by the Constitution, and the lands were nontaxable not-

withstanding Act May 27, 1908, c. 199, §§ 1, 4, purporting to make the land subject to taxation, and the state and all its political subdivisions were bound to give effect to the exemption.

2. COURTS ☞394(18)—SUPREME COURT MAY DETERMINE WHETHER NONFEDERAL GROUNDS OF DECISION WERE WITHOUT SUBSTANTIAL SUPPORT.

The right to an exemption of Indian allotments from taxation under an act of Congress was a federal right, and, when specifically set up and claimed in the petition, the petitioners were entitled to invoke the judgment of the Supreme Court on the question whether such right was given due recognition by the state court, and it was within the province of the Supreme Court to inquire, not only whether the right was denied in express terms, but whether it was denied in substance and effect by putting forward nonfederal grounds of decision without fair or substantial support.

3. COURTS ☞391(4)—DECISION BASED ON NONFEDERAL GROUNDS NOT PLAINLY UNTENABLE NOT REVIEWABLE.

A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable.

4. TAXATION ☞541—PAYMENT OF TAXES ON EXEMPT LANDS NOT VOLUNTARY SO AS TO PREVENT RECOVERY.

Where Indians just emerging from a state of dependency and wardship, who were prosecuting suits to restrain taxation of their lands, paid taxes thereon to prevent a sale and the imposition of a penalty at a time when the county was demanding that they be paid and threatening to sell the land, and actually selling other lands similarly situated, the taxes were not paid voluntarily so as to prevent their recovery.

5. TAXATION ☞535—PAYMENTS UNDER COMPELSION MAY BE RETURNED OR RECOVERED WITHOUT STATUTORY AUTHORITY.

Where the payment of taxes on exempted lands was not voluntary, but under compulsion, no statutory authority was essential to enable or require the county to refund the money.

6. CONSTITUTIONAL LAW ☞284(1)—COLLECTING UNLAWFUL TAX BY COERCION WITHOUT OBLIGATION TO REFUND WOULD TAKE PROPERTY WITHOUT DUE PROCESS.

If a county could collect unlawful taxes on exempt property by coercive means without incurring any obligation to pay them back, it would thereby appropriate the property arbitrarily and without due process of law.

7. CONSTITUTIONAL LAW ☞254—DUE PROCESS CLAUSE IS BINDING ON COUNTY.

Const. U. S. Amend. 14, prohibiting the taking of property without due process of law, binds a county as an agency of the state.

8. TAXATION ☞543(4)—COUNTY IS LIABLE TO REFUND TAXES WRONGFULLY COLLECTED, THOUGH MONEY PAID TO STATE AND MUNICIPALITIES.

A county, which collected taxes on exempt lands of Indians with notice that the owners disputed the liability of the land to taxation and



were contesting such liability in pending suits, was liable for the amount collected, though a portion had been paid over to the state and other municipal bodies, as it had no right to collect the money.

9. CERTIORARI —69—ON REMAND OF CASE BY FEDERAL SUPREME COURT, QUESTION NOT DISCUSSED BY STATE COURT HELD OPEN.

Where in a suit to recover taxes paid by Indians on exempt lands, a demurrer was overruled, and judgment for the petitioners rendered, which was reversed by the state Supreme Court on grounds which the United States Supreme Court holds insufficient to defeat recovery, it is open to the state court, after remand, to deal with the claim, presented by the demurrer, but not discussed by the state Supreme Court, that the petition is barred by limitations.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Proceeding by Coleman J. Ward and others against the Board of County Commissioners of Love County, Okl. Judgment for the petitioners was reversed by the Supreme Court of Oklahoma (Board of Com'rs of Love County v. Ward, 173 Pac. 1050), and they bring certiorari. Motion to dismiss denied, and judgment reversed.

Messrs. John Emerson Bennett, of Ft. Worth, Tex., and George P. Glaze, of Oklahoma City, Okl., for petitioners.

\*18

\*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a proceeding by and on behalf of Coleman J. Ward and sixty-six other Indians to recover moneys alleged to have been coercively collected from them by Love county, Oklahoma, as taxes on their allotments, which under the laws and Constitution of the United States were nontaxable. The county commissioners disallowed the claim and the claimants appealed to the district court of the county. There the claimants' petition was challenged by a demurrer, which was

\*19

overruled \*and the county elected not to plead further. A judgment for the claimants followed, and this was reversed by the Supreme Court. Board of Com'rs of Love County v. Ward, 173 Pac. 1050. The case is here on writ of certiorari. 248 U. S. 556, 39 Sup. Ct. 12, 63 L. Ed. 419.

The claimants, who were members of the Choctaw Tribe and wards of the United States, received their allotments out of the tribal domain under a congressional enactment of 1898, which subjected the right of alienation to certain restrictions and provided that "the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent." Chapter 517, 30 Stat. 507. In the act of 1906, enabling Oklahoma to become a state, Congress made it plain that no

impairment of the rights of property pertaining to the Indians was intended, chapter 3335, § 1, 34 Stat. 267; and the state included in its Constitution a provision exempting from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws." Article 10, § 6. Afterwards Congress, by an act of 1908, removed the restrictions on alienation as to certain classes of allottees, including the present claimants, and declared that all land from which the restrictions were removed "shall be subject to taxation, \* \* \* as though it were the property of other persons than allottees." Chapter 199, §§ 1, 4, 35 Stat. 312.

Following the last enactment the officers of Love and other counties began to tax the allotted lands from which restrictions on alienation were removed, and this met with pronounced opposition on the part of the Indian allottees, who insisted, as they had been advised, that the tax exemption was a vested property right which could not be abrogated or destroyed consistently with the Constitution of the United States. Suits were begun in the state courts to maintain the exemp-

\*20

tion and enjoin the \*threatened taxation, one of the suits being prosecuted by some 8,000 allottees against the officers of Love and other counties. The suits were resisted, and the state courts, being of opinion that the exemption had been repealed by Congress, sustained the power to tax. English v. Richardson, 28 Okl. 408, 114 Pac. 710; Gleason v. Wood, 28 Okl. 502, 114 Pac. 703; Choate v. Trapp, 28 Okl. 517, 114 Pac. 709. The cases were then brought here, and this court held that the exemption was a vested property right which Congress could not repeal consistently with the Fifth Amendment, that it was binding on the taxing authorities in Oklahoma, and that the state courts had erred in refusing to enjoin them from taxing the lands. Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; Gleason v. Wood, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

While those suits were pending the officers of Love county, with full knowledge of the suits, and being defendants in one, proceeded with the taxation of the allotments, demanded of these claimants that the taxes on their lands be paid to the county, threatened to advertise and sell the lands unless the taxes were paid, did advertise and sell other lands similarly situated, and caused these claimants to believe that their lands would be sold if the taxes were not paid. So, to prevent such a sale and to avoid the imposition of a penalty of eighteen per cent., for which the local statute provided, these claimants paid

the taxes. They protested and objected at the time that the taxes were invalid, and the county officers knew that all the allottees were pressing the objection in the pending suits.

As a conclusion from these facts the claimants asserted that the taxes were collected by Love county by coercive means, that their collection was in violation of a right arising out of a law of Congress and protected by the Constitution of the United States, and that the county was accordingly bound to repay the moneys thus collected. The total amount claimed is \$7,833.35, aside from interest.

\*21

\*Such, in substance, was the case presented by the petition, which also described each tract that was taxed, named the allottee from whom the taxes were collected and stated the amount and date of each payment.

In reversing the judgment which the district court had given for the claimants the Supreme Court held, first, that the taxes were not collected by coercive means, but were paid voluntarily, and could not be recovered back as there was no statutory authority therefor; and, secondly, that there was no statute making the county liable for taxes collected and then paid over to the state and municipal bodies other than the county—which it was assumed was true of a portion of these taxes—and that the petition did not show how much of the taxes was retained by the county, or how much paid over to the state and other municipal bodies, and therefore it could not be the basis of any judgment against the county.

The county challenges our jurisdiction by a motion to dismiss the writ of certiorari and by way of supporting the motion insists that the Supreme Court put its judgment entirely on independent nonfederal grounds which were broad enough to sustain the judgment.

[1] As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in *Choate v. Trapp*, supra, and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the state and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love county, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to these claimants, placed them on the county tax roll, and there charged them

\*22

with taxes like other property. If a portion of the taxes was to go to the state and other municipal bodies after collection—which we assume was the case—it still was the county that charged the taxes against these lands

and proceeded to collect them. Payment of all the taxes was demanded by the county, and all were paid to it in the circumstances already narrated.

We accept so much of the Supreme Court's decision as held that, if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute, and that there was no such statute. But we are unable to accept its decision in other respects.

[2, 3] The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co. v. Public Service Commission*, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131; *Leathe v. Thomas*, 207 U. S. 93, 99, 28 Sup. Ct. 30, 52 L. Ed. 118; *Vandalia R. R. Co. v. South Bend*, 207 U. S. 359, 367, 28 Sup. Ct. 130, 52 L. Ed. 246; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. Ed. 1074; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644. And see *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443, 17 L. Ed. 173; *Huntington v. Attrill*, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Boyd v. Thayer*, 143 U. S. 135, 180, 12 Sup. Ct. 375, 36 L. Ed. 103; *Carter v. Texas*, 177 U. S. 442, 447, 20 Sup. Ct. 687, 44 L. Ed. 839. Of course, if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute, etc., R. R. Co. v. Indiana*, 194 U. S. 579, 589, 24 Sup. Ct. 767, 48 L. Ed. 1124. With this qualification, it is true that a judgment of a

\*23

state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof.

[4] The facts set forth in the petition, all of which were admitted by the demurrer whereon the county elected to stand, make it plain, as we think, that the finding or decision that the taxes were paid voluntarily was without any fair or substantial support. The claimants were Indians just emerging from a



state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But, notwithstanding this, the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of eighteen per cent. they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian claimants. *Atchison, Topeka & Santa Fé Ry. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; *Gaar, Scott & Co. v. Shannon*, supra, 223 U. S. 471, 32 Sup. Ct. 236, 56 L. Ed. 510; *Union Pacific R. R. Co. v. Public Service Commission*, supra; *Swift Co. v. United States*, 111 U. S. 22, 29, 4 Sup. Ct. 244, 28 L. Ed. 341; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 10 Sup. Ct. 5, 33 L. Ed. 236; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 329, 29 Sup. Ct. 671, 53 L. Ed. 1013. The county places some reliance on *Lamborn v. County Commissioners*, 97 U. S. 181, 24 L. Ed. 926, and *Railroad v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196; but those cases are quite distinguishable in their

\*24

facts, and some of the \*general observations therein to which the county invites attention must be taken as modified by the later cases just cited.

[5-7] As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Marsh v. Fulton County*, 10 Wall. 676, 684 (19 L. Ed. 1040); *City of Louisiana v. Wood*, 102 U. S. 294, 298, 299, 26 L. Ed. 153; *Chapman v. County of Douglas*, 107 U. S. 348, 355, 2 Sup. Ct. 62, 27 L. Ed. 378. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amend-

ment, which binds the county as an agency of the state.

[8] If it be true, as the Supreme Court assumed, that a portion of the taxes was paid over, after collection, to the state and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants and were being contested in the pending suits. In these circumstances it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own. *Atchison, Topeka & Santa Fé Ry. Co. v. O'Connor*, supra, 223 U. S. 287, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050. In legal contemplation it received the money for the use and benefit of the claimants and should respond to them accordingly.

\*25

[9] \*The county calls attention to the fact that in the demurrer to the petition the statute of limitation (probably meaning section 1570, Rev. Laws 1910) was relied on. This point was not discussed by the Supreme Court and we are not concerned with it beyond observing that when the case is remanded it will be open to that court to deal with the point as to the whole claim or any item in it as any valid local law in force when the claim was filed may require.

Motion to dismiss denied.

Judgment reversed.

(253 U. S. 25)

# BROADWELL v. BOARD OF COUNTY COM'RS OF CARTER COUNTY, OKL.

(Submitted March 25, 1920. Decided April 26, 1920.)

No. 289.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Proceeding by George R. Broadwell against the Board of County Commissioners of Carter County, Okl. A judgment for defendant was affirmed by the Supreme Court of Oklahoma (175 Pac. 828), and petitioners bring certiorari. Motion to dismiss denied, and judgment reversed.

See, also, 249 U. S. 594, 39 Sup. Ct. 259, 63 L. Ed. 794.

Messrs. George P. Glaze and Charles L. Moore, both of Oklahoma City, Okl., for petitioner.

Messrs. George B. Rittenhouse, of Oklahoma City, Okl., Clinton A. Galbraith, of Ada, Okl., P. T. McVay, of Oklahoma City, Okl., and J. A. Bass, of Ardmore, Okl., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a proceeding to recover moneys charged to have been paid under compulsion by a num-

\*26

ber of Choctaw and \*Chickasaw Indians to Carter county, Oklahoma, as taxes on allotted

lands which were nontaxable. The county commissioners disallowed the claim; the district court of the county to which the claimants appealed sustained a demurrer to their petition and rendered judgment against them, and the Supreme Court affirmed the judgment. 175 Pac. 828. The total amount claimed is \$22,455.99, aside from interest.

The case as presented here is in all material respects like *Ward v. Love County*, 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. —, just decided, and its decision properly may be rested on the opinion in that case.

Motion to dismiss denied.

Judgment reversed.

(253 U. S. 1)

UNITED STATES v. ATLANTIC DREDGING CO. et al.

(Argued March 16, 1920. Decided April 26, 1920.)

No. 214.

1. UNITED STATES  $\S$  70(2)—SPECIFICATIONS REQUIRING BIDDERS TO EXAMINE WORK HELD NOT TO RELIEVE GOVERNMENT FROM LIABILITY FOR MISREPRESENTATIONS.

Where the specifications for a dredging contract stated that the material was believed to be mainly mud, or mud with an admixture of sand, and that a number of test borings had been made, the results of which might be seen on the maps on file; but the maps showed the material to be the same as stated in the specifications, and did not show the field notes of the borings or contain a true description of the material as encountered, or as shown by the field notes, and the contractor's plan, submitted for approval as required, was approved, though it was only efficient for dredging material of the character mentioned in the specifications, the government was not relieved of liability by a statement in the specifications that bidders were expected to examine the work, and that the United States did not guarantee the accuracy of the description.

2. UNITED STATES  $\S$  70(2) — CONTRACTOR HELD NOT TO HAVE ELECTED TO CONTINUE CONTRACT NOTWITHSTANDING MISREPRESENTATIONS.

A dredging contractor, by continuing with the work after discovering that the materials to be removed were different from those represented, did not elect to continue the work, so as to prevent it from suing for damages, where it did not then know of the concealment of the results of test borings made by the government.

3. UNITED STATES  $\S$  96 — CLAIM FOR EXTRA COMPENSATION, BECAUSE MATERIAL TO BE DREDGED WAS DIFFERENT FROM THAT REPRESENTED, NOT ONE FOR TORT.

An action in the Court of Claims to recover the additional cost of dredging, due to the material to be dredged proving to be different from that represented, was not one for tort, which could not be maintained against the United States, where there was no intimation of bad

faith against the officers of the government, and the amount recovered was simply compensatory.

The Chief Justice and Mr. Justice Clarke dissent.

Appeal from the Court of Claims.

Claim by the Atlantic Dredging Company and another against the United States. From a judgment in favor of the claimants (53 Ct. Cl. 490), the United States appeals. Affirmed.

Action in the Court of Claims to recover the sum of \$545,121.72 from the United States on account of expenditures and loss caused, it is alleged, in the execution of a contract which it was induced to enter into by false and misleading statements of the officers of the United States in charge of excavations in the Delaware river.

In pursuance of advertisement by the United States through Col. Kuhn, the dredging company entered into a contract to do a certain part of the work for the sum of 12.99 cents per cubic yard, scow measurement.

Sealed proposals were required by the advertisement and it was stated that information could be had on application, and bidders were invited to base their bids upon the specifications, which had been prepared by, and were submitted by the government.

The specifications stated that the depth of the channel to be dredged was 35 feet, and under the heading "Quality or Character of the Material" contained the following:

"The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from station 54 to station 55+144, at the lower end of West Horse-shoe Range (the latter is not included in the contract) where the material is firm mud, sand, and gravel or cobbles."

It was stated that—

"Bidders were expected to examine the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

The further statement was that—

"A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy."

To ascertain the character of the material to be dredged the government officers had subjected the bottom of the river to certain borings, called, according to their manner of being made, "test borings and wash borings," and the results thereof were correctly reported and recorded on the log or field notes at



the time—that is, that the probe had penetrated or had not penetrated—but there was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made. It was hence shown that the material to be encountered was “mainly mud or mud with an admixture of sand.” In other words, the map did not contain a true description of the character of the material which was to be encountered, and was encountered by the dredging company in the prosecution of the work. The material dredged, at certain places, differed from that shown on the map exhibited to bidders. The company made no independent examination, though it had time to do so, and in making its proposal it stated that it did so with full knowledge of the character and quality of the work required.

The proposals required the character and capacity of the plant proposed to be employed by the contractor to be stated and that it should be kept in condition for efficient work and be subject to the inspection and approval of the “contracting officer.” In compliance with the requirement the plant was submitted to such officer and by him inspected and approved. It was efficient for dredging the character of material mentioned in the specifications and described on the map to which bidders were referred for information; it was not efficient for dredging the material actually found to exist, and the company secured the services of another concern to do the dredging for it, and that concern did all of the work that was done.

After the company, and the concern it had employed, had been at work for some time, it complained of the character of material which was being encountered, and a supplementary contract was entered into by it and the “contracting officer.”

This contract recited that “heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles had been encountered,” and provided that such material might be deposited in the Delaware river, instead of on shore, as provided in the original contract.

At the time of making the supplemental contract the company was not aware of the manner in which the “test borings” over the area embraced in its contract had been made. Upon learning of this in December, 1915, it discontinued work and declined to do further work. The company then had not been informed of the fact that impenetrable material had been reached by the probe. At the time of the cessation of work there remained approximately 350,000 cubic yards of material to be dredged in the area of the contract. The American Dredging Company completed the dredging at 16.2 cents per cubic yard.

The amount expended by the company was \$354,009.19, upon which it had received \$142,959.10, making its loss on the contract \$211,

050.09. For such sum judgment was rendered, and the United States prosecuted this appeal.

\*4

\*Mr. Assistant Attorney General Davis, for the United States.

\*7

\*Mr. William L. Marbury, of Baltimore, Md., for appellees.

\*9

\*After stating the case as above, Mr. Justice McKENNA delivered the opinion of the Court.

[1] The case turns upon the statement of the government of its belief of the character

\*10

of the material to be encountered, and, as misrepresentation, the omission from the map exhibited to bidders of the actual borings made and their disclosures.

The government asserts that there was no misrepresentation, basing the assertion upon the declaration of the specifications that no guarantee was intended and the admonition to bidders that they must decide as to the character of the materials to be dredged, and to “make their bids accordingly.”

The assertion puts out of view, we think, other and determining circumstances. There was not only a clear declaration of the belief of the government that its representation was true, but the foundation of it was asserted to be the test of actual borings, and the reference to maps as evidence of what the borings had disclosed. The finding is that the maps contained a record of 26 borings as covering specified sections that were to be dredged, and of these 10 were in the section of the river, which, by its contract afterwards made, the plaintiff agreed to dredge.

There was a further assertion of belief, through its “contracting officer,” by the approval of the company’s plant. As we have seen the government’s care of its interests extended to the inspection of the instrumentalities of the contractor, and required the character and capacity of the plant which was to be used, to be submitted for inspection and approval. In fulfillment of the requirement the company submitted its plant. It was only efficient for dredging material of the character mentioned in the specifications and described on the map, and it was so approved. The significance of the submission and approval are manifest. The character and capacity of the plant conveyed to the officer the fact that the company was accepting as true the representation of the specifications and the map of the materials to be dredged; and reciprocally the approval of the plant by

\*11

the officer was an assurance to the company of the truth of the representation and a justification of reliance upon it.

The case is therefore within the ruling of *United States v. Spearin*, 248 U. S. 132, 136, 39 Sup. Ct. 59, 63 L. Ed. 166, where it is stated that the direction to contractors to visit the site and inform themselves of the

actual conditions of a proposed undertaking, will not relieve from defects in the plans and specifications, citing *Christie v. United States*, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933, *Hollerbach v. United States*, 233 U. S. 165, 34 Sup. Ct. 553, 58 L. Ed. 898, and *United States v. Utah, Nevada & California Stage Co.*, 199 U. S. 424, 26 Sup. Ct. 69, 50 L. Ed. 251. It is held in those cases "that the contractor ought to be relieved, if he was misled by erroneous statements in the specifications." The present case is certainly within the principle expressed. In the cited cases there was no qualification of the requirement; in this case it was accompanied by the expression of belief, and conduct which was, in effect, a repetition and confirmation of the belief and gave assurance that it had a reliable foundation. The company, therefore, was justified in acting upon it.

[2] The government, however, contends that at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that having elected the latter, it cannot now resort to the other. In fortification of this contention it is said that—

"Even if the government made a misrepresentation as to the borings that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.'"

This assumption and the extent of it and the conclusion from it, are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that it, the

\*12

company, attempted to \*struggle on against the difficult conditions with its inefficient plant, should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the "test borings" had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work, that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

[3] The government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the government, and the Court of Claims regarded the representation of the character of the material as in the nature of a warranty; besides, its judgment is in no way punitive. It is sim-

ply compensatory of the cost of the work, of which the government got the benefit.

Affirmed.

The CHIEF JUSTICE and Mr. Justice CLARKE dissent.

(253 U. S. 26)

UNITED STATES v. READING CO. et al.†

READING CO. et al. v. UNITED STATES.

(Argued Oct. 10, 11, 1916. Restored for Reargument May 21, 1917. Reargued Nov. 20, 21, 1917. Restored for Reargument June 10, 1918. Reargued Oct. 7, 1919. Decided April 26, 1920.)

Nos. 3, 4.

1. MONOPOLIES ⇐20—STOCK CONTROL OF RAILROAD COMPANY AND LARGE COAL COMPANY BY HOLDING COMPANY HELD A "COMBINATION TO UNDULY RESTRAIN INTERSTATE COMMERCE."

A scheme of reorganization of a railroad company and a coal mining company which owned almost two-thirds of the land in one of the three large Pennsylvania coal fields, and whose stock was owned by the railroad company, whereby a holding company acquired all the stock of the other two companies giving its board of directors control of the largest coal company in such field and almost 1,000 miles of railroad over which its coal must find access to interstate markets, constituted a "combination to unduly restrain interstate commerce" within Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

2. MONOPOLIES ⇐24(2)—EVIDENCE HELD TO SHOW THAT RAILROADS AND COAL COMPANIES WERE COMPETITORS PRIOR TO PURCHASE OF STOCK CONTROL.

In an action under Anti-Trust Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830), evidence held to show that a railroad company whose stock was owned by a holding company and another railroad company in whose stock the holding company purchased a controlling interest were competitors prior to such purchase, and that a coal company controlled by the holding company and one controlled by the railroad company so purchased were also competitors prior to the purchase.

3. MONOPOLIES ⇐20—COMMERCE RESTRAINED AND COMPETITION DISCOURAGED BY CARRIER'S FAVORITISM.

For a railroad company or a holding company controlling a railroad to make large advances to a coal company also controlled by it, and shipping coal over its lines, and to grant it unusual credits in the payment of its freight bills, tends to unduly restrain interstate commerce.

4. MONOPOLIES ⇐16(1)—COVENANT BY LESSOR TO SHIP COAL OVER LEASED LINE NOT UNLAWFUL.

Where an owner of extensive coal producing properties leased a railroad owned by it to

† Motion to modify decrees denied 253 U. S. 478, 46 Sup. Ct. 585, 64 L. Ed. —.



a connecting, but not competing road, to which its line served as a natural extension, its covenant to ship all of its coal over the leased line did not violate Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830), where its purpose was not to suppress interstate commerce and instead of suppressing it, it greatly promoted such commerce.

5. MONOPOLIES 16(1)—ENFORCEMENT OF COVENANTS TO SHIP COAL BY CERTAIN LINES PROPERLY ENJOINED WHEN PART OF UNLAWFUL SCHEME.

Enforcement of covenants in leases of coal producing lands, requiring the lessee to ship all coal mined by rail routes named or to be designated, was properly enjoined in a suit under Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830), where they were resorted to as part of a scheme to control the mining and transportation of coal.

6. MONOPOLIES 20—RELATION BETWEEN RAILROADS AND COAL COMPANIES ORDERED DISSOLVED.

Where a railroad constituting an outlet to one of the large anthracite coal fields of Pennsylvania acquired more than two-thirds of the acreage of such field with the avowed purpose of monopolizing the production, transportation, and sale of coal, and subsequent to Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830) the railroad company and an affiliated coal company were reorganized and all of the stock of both issued to a holding company to evade the state law and the act of 1890, and the holding company subsequently purchased control of a great competing coal carrying railroad with its extensive coal owning and mining subsidiary, and thereafter the holding company exercised the power so acquired by participating in flagrant violations of the Anti-Trust Act, the relations between the various companies will be ordered dissolved so as to give to each a position in all respects independent and free from stock or other control of either of the other corporations.

7. MONOPOLIES 16(1)—TRANSPORTATION BY RAILROAD OF COAL PRODUCED BY COMPANY CONTROLLED BY SAME HOLDING COMPANY IS FORBIDDEN BY STATUTE.

Where a railroad company, a coal mining company, and a holding company owning all of the stock of the other two companies have the same officers and directors, the mines are worked and the railroad operated by the same authority within the meaning of Act June 29, 1906, making it unlawful for any railroad company to transport in interstate commerce any article or commodity produced or mined by it, or under its authority, and the transportation by the railroad company of coal produced by the coal company is a violation of that act.

8. MONOPOLIES 16(1)—TRANSPORTATION BY RAILROAD OF PRODUCTS OF MINING COMPANY CONDUCTED AS DEPARTMENT OF RAILROAD COMPANY IS FORBIDDEN BY STATUTE.

While the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under Act June 29, 1906, for the railroad company to transport in interstate commerce the products of the mining company,

yet where such ownership is not resorted to for the purpose of participating in the affairs of the mining corporation in the manner normal and usual with stockholders, but, for the purpose of making it a mere agent or instrumentality or department of the railroad company the transportation of the products of the mining company is unlawful.

Mr. Chief Justice White, Mr. Justice Holmes, and Mr. Justice Van Devanter dissenting.

Appeals from the District Court of the United States for the Eastern District of Pennsylvania.

Suit by the United States against the Reading Company and others. From a decree granting insufficient relief (226 Fed. 229), the United States appeals, and defendants also appeal. Affirmed in part, reversed in part, and remanded, with directions.

Messrs. Solicitors General Davis and King and G. Carroll Todd, of Washington, D. C. (Mr. T. W. Gregory, Atty. Gen., on the brief), for the United States.

Mr. Jackson E. Reynolds, of New York City, argued and filed briefs for the several Reading Company defendants.

Messrs. Charles Heebner and William Clarke Mason, both of Philadelphia, Pa., filed brief for Philadelphia & Reading Ry. Co.

Mr. John J. Beattie, of Warwick, N. Y., filed brief for Lehigh & Hudson River Ry. Co.

Messrs. Henry S. Drinker, Jr., and Abraham M. Beitler, both of Philadelphia, Pa., filed brief for Lehigh Coal & Navigation Co.

Mr. William J. Turner, of Philadelphia, Pa., filed brief for Lehigh & New England Ry. Co.

Mr. Robert W. De Forest, of New York City, argued orally for defendant Central R. Co. of New Jersey.

\*40

\*Mr. Justice CLARKE delivered the opinion of the Court.

These are appeals from a decree entered in a suit instituted by the government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations

\*41

they \*constitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce in violation of the first and second sections of the Anti-Trust Act of Congress, of July 2, 1890 (26 Stat. 209 [Comp. St. §§ 8820, 8821]); and also for the alleged reason that the defendants, Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, are violating the commodities clause of the act of Congress of June 29, 1906 (34 Stat. 585 [Comp. St. § 8563(6)]) by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as Holding Company; Philadelphia & Reading Railway Company as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company as Wilkes-Barre Company; Lehigh Coal & Navigation Company as Navigation Company.

Practically all of the anthracite coal in this country is found in Northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes these coal areas are designated: The most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal; the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles, and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles,

and Philadelphia, distant \*about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and to some extent, through the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York harbor, viz.: The Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadelphia and New York, viz.: The Reading and the Pennsylvania Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.<sup>1</sup>

The essential claims of the government in the case have become narrowed to these, viz.:

First. That the ownership by the Holding

Company of controlling interests in the shares of the capital stocks of the Reading Railway Company, of the Reading Coal Company and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce and an attempt to monopolize and a monopolization of a part of the same in violation of the Anti-Trust Act of July 2, 1890.

Second. That the Holding Company in itself constitutes a like violation of the act.

Third. That certain covenants and agreements between the Central Railroad Compa-

ny and the Navigation Com\*pany contained in a lease, by the latter to the former, of the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth. That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them, constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the act of June 25, 1910 (36 Stat. 854 [Comp. St. § 8824]), the case was heard by three Circuit Judges of the Third circuit, who while holding against the contention of the government on many of the prayers for relief in the bill, some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal, and that their union through the Holding Company and the Central Company constituted a combination in restraint of trade within the Anti-Trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds, and other securities of the Wilkes-Barre Coal Company owned by it, and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads, named or to be designated, were unlawful and void.

The case has been appealed by both parties, and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by the Holding Company will be of value for the assistance it will be in

determining the intent and purpose \*with which the combinations here assailed were formed. *Standard Oil Co. v. United States*, 221 U. S. 1, 46, 76, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

The Philadelphia & Reading Railroad Company was chartered by special act of the Pennsylvania General Assembly in 1833 (P. L. 144), and it conducted the business of a

<sup>1</sup> *United States v. Reading Co. et al.* (C. C.) 183 Fed. 427; *United States v. Reading Co. et al.* (D. C.) 226 Fed. 229; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *United States v. Lehigh Valley Railroad Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458; *United States v. Delaware, Lackawanna & Western Railroad Co.*, 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438; *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.



railroad carrier prosperously for about 30 years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the company for 1870 contains the following:

"Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired and will be held by an auxiliary company known as the Philadelphia & Reading Coal and Iron Company of which the Philadelphia & Reading Railroad Company is the only stockholder. The result of this action has been to secure—and attach to the company's railroad—a body of coal land capable of supplying all the coal tonnage that can possibly be transported over the road for centuries."

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company and the only doubt in the past as to the permanency of the earning power of the company as a transporter was due to the fear that rival companies would tap the Schuylkill region and divert the coal tonnage to their own lines. This danger was happily averted by the purchase of the coal lands."

And this from the report of 1881:

"The coal estates of the Philadelphia & Reading Company \* \* \* consist of 91,149 acres (142 square miles) of coal lands, which is sixty per cent of all the anthracite lands in the Schuylkill district, and thirty per cent of all in Pennsylvania."

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

\*45  
 "The coal lands comprise in extent about thirty-three per cent of the entire anthracite coal fields of the state, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions which has been going on for many years, it must be conceded that we have at least fifty per cent of the entire deposit remaining unmined."

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthracite carriers, competing with the Reading and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of

the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds and receivers were appointed who operated both properties until 1896 when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

First. To the Reading Railway Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000

\*46  
 miles of the railroad (but none of the equipment) which had been owned or leased by the former Reading Railroad Company. The capital stock of this company was fixed at \$20,000,000 and it issued \$20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at \$90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite—more than one-fifth of the then total production of the country. But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars and ships, owned by the former Railroad Company, and its tidewater terminals at Philadelphia and on New York Harbor, were allotted to the Holding Company.

Second. By the decree of sale the Reading Coal & Iron Company was released from its former obligations and to it thus freed the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for \$135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased—almost two-thirds of the entire acreage of the Schuylkill coal field—stocks and bonds in other coal companies, coal in storage and other property, all of the estimated value of \$95,000,000.

Third. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the General Assembly of Pennsylvania, but unused for 20 years, was utilized. This charter was of the class denominated "omnibus" by the Supreme Court

\*47  
 of Pennsylvania, and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed

to "Reading Company," its capital stock was increased from \$100,000 to \$140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned by the Reading *Railroad* Company, together with stocks which gave it control of more than 30 short line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railway* Company and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal & Iron Company, was that the Holding Company without any outlay—solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of \$34,400,000; plus all of the capital stock and bonds of the new Railway Company, \$40,000,000; plus all of the capital stock of the Coal Company, \$8,000,000, and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds and mortgages owned by the former Railroad Company of the estimated value of over \$38,000,000—making a total value, as represented at the time to the New York Stock Exchange, of \$193,613,000.

[1] Thus, this scheme of reorganization,

\*48

adopted and executed 6 years after the enactment of the Anti-Trust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously, thus acquired power: To increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. *United States v. Union Pacific R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

Obviously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing,

and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder—the Holding Company—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating \$28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of \$135,000,000 and its capital stock of \$140,000,000. The Holding Company thus served to pool the property, the activities and the profits of the three companies. *Northern Securities Co. v. United States*, 193 U. S. 197, 327, 362, 24 Sup. Ct. 436, 48 L. Ed. 679.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

\*49

\*In 1898 this Holding Company entered into a combination with five other anthracite carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater, which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders for the purpose of providing \$5,000,000 with which the properties of the chief independent operators, Simpson and Watkins, were purchased and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise and that company, although only one of six, became responsible for 30 per cent. of the required financing. In *United States v. Reading*, 226 U. S. 324, 351, 33 Sup. Ct. 90, 96 (57 L. Ed. 243), this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

"The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at page 355 of 226 U. S., at page 97 of 33 Sup. Ct. (57 L. Ed. 243):

"We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states in plain violation of the act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated or which might thereafter be opened and operated," and to pay



\*50

therefor \*65 per cent. of the average price of coal prevailing at tidewater points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: That they were made for the purpose of eliminating the competition of independent operators from the markets and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed"; that before these contracts, there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants, but that after the contracts were made "such competition was impracticable"; that the case fell well within not only the Standard Oil and Tobacco Cases, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally that the defendants had combined, by and through the instrumentality of the 65 per cent. contracts with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within 2 years and again within 4 years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and of corporate agency, for the purpose of violating, in a flagrant manner, the Anti-Trust Act of 1890.

[2] Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite—almost one-half of its total freight traffic. Its capital stock was then \$27,436,000 and its funded debt was \$46,881,000.

This Central Company owned, at the time,

\*51

in excess of \*eleven-twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over \$9,000,000 and a funded debt of about \$17,000,000. And that company owned or had leased in excess of 14,000 acres of coal bearing lands—13,000 acres in the Wyoming field—and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over \$20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the

commencement of this suit, and from one-third to one-half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading System were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

"Q. You are president of the defendants, the Reading Company, Philadelphia & Reading Railway Company, Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and the Temple Iron Company?

"A. I am. \* \* \*

"Q. What do you regard as the competitors of the Philadelphia & Reading now in New York Harbor, as to anthracite coal?

"A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the

Delaware & Hudson, \*52 the Erie, Ontario & Western. I guess those are all the roads leading to New York directly or indirectly. [He did not name the Central Company because it was a part of the Reading System when he testified.]

"Q. Those roads are all carrying anthracite coal to New York Harbor?

"A. Yes, sir.

"Q. And you regard them as competitors who must be considered in fixing rates?

"A. Yes, sir; unquestionably."

Mr. Harris testified:

"Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

"A. We came in competition with all the roads that were carrying coal from Pennsylvania.

"Q. Name the principal ones in reference to carrying coal from the coal mines to New York Harbor.

"A. The Reading, the Lehigh Valley, the Central Railroad of New Jersey, the Delaware, Lackawanna & Western, the Erie, and the Pennsylvania Railroad."

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer put this also beyond dispute by testifying:

"Q. Prior to 1901 were the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Company competitors as sellers of coal in New York Harbor?

"A. Yes; and they are to-day.

"Q. And generally throughout the eastern territory they were competitors at that time?

"A. Yes, sir; through that northern territory. Not in this territory nor in the southern."

Thus, by this purchase, the Reading Holding Company \*acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies, in the country. The anthracite tonnage of the Central and Reading Railway Companies thus combined, exceeded, at the time, 18,000,000 tons—over one-third, of the then total production of the country—and the revenue derived from it was more than one-third of the total earnings of the two railroad companies.

[3] In 1915 the Interstate Commerce Commission concluded an investigation of the "Rates, practices, rules and regulations governing the transportation of anthracite coal," which had been in progress for 3 years. The 11 initial anthracite carriers which have lines penetrating the coal producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the commission found: That since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of co-operation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading Companies. The commission also found, and this appears in the record of this case, that the Reading Coal Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding \$68,000,000 for advances of capital made by the Reading Railroad Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than \$30,-

\*54

900,000 of equaling 4 per cent. per annum on the indebtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted save as to some findings of the Interstate Commerce Commission,

we must proceed to judgment, and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

[4] In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the government claims requires the Navigation Company to ship to market over the leased line three-fourths of all of the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-Trust Act.

Is is not entirely clear that the covenant will bear the restrictive interpretations as to

\*55

shipments which the \*government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, N. J., and it was without access to the coal fields. The Lehigh & Susquehanna Railroad was about 100 miles in length and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal producing properties and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh & Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage producing coal districts. The rental to be paid was one-third of the gross earnings of the railroad and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained and the decree of the District Court with respect to it will be affirmed and the bill, as to it, dismissed.

[5] In many leases for the operation of coal producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned



as unlawful in this opinion, the decree of the District Court enjoining the lessors and the other defendants herein from attempting to enforce such covenants will be affirmed.

The other charges against the Lehigh Coal

\*56

& Navigation Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company are substantially abandoned in the government's brief, and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the District Court as to all but the Wilmington & Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading Companies, the Central Railroad Company of New Jersey and the Wilkes-Barre Coal Company.

[6] Before the reorganization of 1896 the gathering of more than two-thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation and sale of the anthracite coal of the largest of the three sources of supply.

When in 1896 the problem was presented of reorganizing the financial affairs of the two companies, it was not solved as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were

\*57

adapted, but, on the contrary, and very obviously for the purpose of evading the provision of the Constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Constitution of Pennsylvania 1874, art. 17, § 5), and also of evading the provisions of the federal Anti-Trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with

the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when in 1901 a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal carrying system, with its extensive coal owning and mining subsidiary. This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act has been frequently held by this court.

\*58

\*Thus, in *Northern Securities Co. v. United States*, 193 U. S. 197, 327, 24 Sup. Ct. 436, 452 (48 L. Ed. 679), when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise \* \* \* in restraint of commerce among the several states or with foreign nations'—or could more effectively and certainly suppress free competition between the constituent companies. \* \* \* *The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.*"

And again, in *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 88, 33 Sup. Ct. 53, 58 (57 L. Ed. 124), decided 9 years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. \* \* \* Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after

the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when discussing a similar state Anti-Trust Act in *International Harvester Co. v. State of Missouri*, 234 U. S. 199, 209, 34 Sup. Ct. 859, 862 (58 L. Ed. 1276, 52 L. R. A. [N. S.] 525), it was said:

"The specification under this head is that the Supreme Court [of Missouri] found, it is con-

\*59

tended, benefit—not \*injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect.* \* \* \* The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-Trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time, successfully until this court condemned the 65 per cent. contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad System, and also of the two coal companies, thus effectually suppressing all competition, between the four companies and pooling their earnings. It is difficult to imagine a clearer case and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by *United States v. Union Pacific R. R. Co.*, supra.

For flagrant violation of the first and second sections of the Anti-Trust Act, the rela-

\*60

tions between the Reading \*Company, the Reading Railway Company and the Reading Coal Company and between these companies and the Central Railroad Company of New Jersey must be so dissolved as to give to each of them a position in all respects inde-

pendent and free from stock or other control of either of the other corporations.

[7] With respect to the contention that the commodities clause of the Act of June 29, 1906 (34 Stat. 584, 585), is being violated by the Reading Railway Company and the Central Railroad Company:

The Circuit Judges centering their attention upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company, that the two companies had separate forces of operatives and separate accounting systems, and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded upon the authority of *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 413, 29 Sup. Ct. 527, 53 L. Ed. 836, that the evidence did not justify holding that in transporting the products of the Reading Coal Company's mines to market the Reading Railway Company was carrying a commodity "mined or produced by it or under its authority" or which it owned "in whole or in part" or in which it had "any interest, direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was

\*61

to put an \*end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury—any discriminating practice which would harm the general shipper would profit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity \* \* \* mined or produced by it, or under its authority, or which it may



own in whole or in part, or in which it may have any interest, direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading Companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the

\*62

entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines. The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-Trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

[8] The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven-twelfths of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, supra, is especially pressed in argument—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 272, 31 Sup. Ct. 387, 55 L. Ed. 458, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the affairs of a Coal Company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in *United States v. D. L. & W. R. R. Co.*, 238 U. S. 516, 529, 35 Sup. Ct. 873, 59 L. Ed. 1438. It results that it may confidently be stated that the law upon this subject now is that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as

to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership

\*63

of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 272, 31 Sup. Ct. 387, 55 L. Ed. 458; *United States v. D. L. & W. R. R. Co.*, 238 U. S. 516, 529, 35 Sup. Ct. 873, 59 L. Ed. 1438; *Chicago, Milwaukee & St. Paul R. R. Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, 501, 38 Sup. Ct. 553, 62 L. Ed. 1229.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven-twelfths of the capital stock of the latter and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal & Navigation Company, the Lehigh & New England Railroad Company, the Lehigh & Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington and Northern Railroad Company and as to the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Read-

\*64

ing Coal & Iron Company and the Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company, existing and maintained through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property

of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

Affirmed in part; reversed in part, and remanded, with direction to enter a decree in conformity with this opinion.

Mr. Chief Justice WHITE, Mr. Justice HOLMES, and Mr. Justice VAN DEVANTER, dissenting.

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States brought to sever

\*65

the existing relations \*between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade in violation of the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830) and gave rise to a disregard of the commodities clause of the act of Congress (Comp. St. § 8563 [6]).

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed and virtually the full relief prayed by the government is therefore granted. We are unable to concur in this conclusion because in our opinion neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view because the court below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took and also demonstrates the error involved in the decree of this court reversing its action. *United States v. Reading Co. et al.* (D. C.) 226 Fed. 229. To that opinion we therefore refer as stating the reasons for our dissent.

(253 U. S. 66)

WALLACE et al. v. HINES, Director General of Railroads, et al.

(Argued April 21, 1920. Decided May 3, 1920.)

No. 683.

1. TAXATION ⚡608(9)—ENFORCEMENT OF TAX MAY BE ENJOINED, IF THERE IS NO ADEQUATE REMEDY AT LAW.

The enforcement by state officers of a tax imposed on railroad companies may be enjoined, unless there is an adequate remedy at law against the state to which the tax is to be paid, where the tax is made a first lien on the property of the companies, and delay in payment is visited with considerable penalties.

2. TAXATION ⚡608(9)—POSSIBILITY THAT STATE COURT WOULD PERMIT SUIT TO RECOVER TAX NOT GROUND FOR DENIAL OF INJUNCTION.

An injunction to restrain state officers from enforcing a tax will not be denied, on the ground that there is an adequate remedy at law against the state to recover the tax, because of the possibility that the state court might hold that Comp. Laws, N. D. 1913, § 8175, authorizing actions respecting the title to property or arising upon contract to be brought against the state, authorizes an action to recover such tax, as the case does not arise upon contract, except in a purely artificial sense.

3. COMMERCE ⚡72—CONSTITUTIONAL LAW ⚡283—TAXATION ⚡53—EXCISE TAX ON FOREIGN RAILROAD CORPORATIONS, COMPUTED ON PROPERTY IN PROPORTION TO MILEAGE, IS INVALID.

Laws N. D. 1919, c. 222, imposing an excise tax on foreign corporations doing business in the state, constitutes an unwarranted interference with interstate commerce and a taking of property without due process of law, in so far as it authorizes the tax against interstate railroad companies to be based on such part of the entire property of the corporation as the mileage within the state bears to the entire mileage, where it appears that the cost of constructing railroads was less in North Dakota than in other states and that the railroad companies' terminals are in other states.

4. TAXATION ⚡166—TAX ON FOREIGN CORPORATION CAN ONLY BE BASED ON PROPERTY WHICH ADDS TO VALUE OF THAT WITHIN THE STATE.

A state, in taxing the property of foreign corporations, may only look beyond its borders to get the true value of things within the state, when they are a part of an organic system of wide extent, giving them a value above what they would otherwise possess, and property of an interstate railroad situated elsewhere cannot be taken into account, unless in some plain and fairly intelligible way it can be seen that it adds to the value of the road and the rights exercised in the state.

Appeal from the District Court of the United States for the District of North Dakota.

Suit by Walker D. Hines, Director General of Railroads, and others, against George



Wallace and others. From an order granting a temporary injunction, defendants appeal. Affirmed.

\*67

\*Mr. F. E. Packard, of Bismarck, N. D., for appellants.

Mr. E. Marvin Underwood, of Washington, D. C., for appellee Hines.

Mr. Charles W. Bunn, of St. Paul, Minn., for appellees railway companies.

Mr. Justice HOLMES delivered the opinion of the Court.

[1, 2] This is an appeal from an order of three judges restraining the defendants, the appellants, from taking steps to enforce taxes imposed by an act of North Dakota, approved March 7, 1919, (c. 222,) until the further order of the Court. The plaintiff railroads are corporations of other States with lines extending into North Dakota. The defendants are the State Tax Commissioner, the State Treasurer, the State Auditor, the Attorney General and the Secretary of State for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the State and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State, to which the tax is to be paid. *Shaffer v. Carter* (March 1, 1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 472, 32 Sup. Ct. 236, 56 L. Ed. 510. The only ground for supposing that there is such a remedy is a provision that "an action respecting the title to property, or arising upon contract may be brought in the district court against the

\*68

\*State the same as against a private person." Compiled Laws, N. D. 1913, § 8175. This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought. *Union Pacific R. R. Co. v. Weld County*, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110.

[3] We quote the tax law in full.<sup>1</sup> It will

\*69

be seen that it \*purports to be a special excise tax upon doing business in the State. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

[4] The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that

state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state, as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year: Provided, that for the purpose of this tax an exemption of \$10,000.00 from the amount of capital invested in the state shall be allowed: Provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

<sup>1</sup> (2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each \$1,000.00 of the capital actually invested in the transaction of business in the state: Provided, that in the case of a corporation engaged in business partly within and partly without the

it adds to the value of the road and the  
 \*70  
 rights exercised in the State. Hence the \*pos-  
 session of bonds secured by mortgage of  
 lands in other States, or of a land-grant in  
 another State or of other property that adds  
 to the riches of the corporation but does not  
 affect the North Dakota part of the road is  
 no sufficient ground for the increase of the  
 tax—whatever it may be—whether a tax on  
 property, or, as here, an excise upon doing  
 business in the State. *St. Louis Southwest-  
 ern Ry. Co. v. Arkansas*, 235 U. S. 350, 364,  
 35 Sup. Ct. 99, 59 L. Ed. 265. In this case,  
 it is alleged, the tax commissioner's valua-  
 tion included items of the kind described to  
 very large amounts. The foregoing consid-  
 erations justify the preliminary injunction  
 that was granted against what would appear  
 to be an unwarranted interference with in-

terstate commerce and a taking of property  
 without due process of law. *Fargo v. Hart*,  
 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761;  
*Union Tank Line Co. v. Wright*, 249 U. S.  
 275, 282, 39 Sup. Ct. 276, 63 L. Ed. 602.

The Attorney General of the State in his  
 very candid argument suggested that if the  
 mode adopted by the tax commissioner were  
 open to objections the statute might be con-  
 strued to give him an election as to the meth-  
 od of distribution, and that he should take  
 gross earnings, or, if more easily ascertain-  
 able, the property or mileage basis of distri-  
 bution. As we are dealing only with a pre-  
 liminary injunction we confine our considera-  
 tion to a general view of the mode actually  
 followed, and upon that we are of opinion  
 that the decree should be affirmed.

Decree affirmed.



(253 U. S. 149)

**KNICKERBOCKER ICE CO. v. STEWART.**

(Argued Dec. 16, 1919. Decided May 17, 1920.)

No. 543.

**1. ADMIRALTY ⇐1—CONGRESS HAS EXCLUSIVE POWER OF LEGISLATION IN MARITIME MATTERS.**

Under Const. art. 3, § 2, providing that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, and article 1, § 8, authorizing Congress to make necessary and proper laws for carrying out granted powers, the Constitution adopted and established as part of the laws of the United States approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction, and took from the states all power by legislation or judicial decision to contravene the essential purposes or work material injury to characteristic features of such law.

**2. STATES ⇐4—RESERVATION OF CONCURRENT JURISDICTION TO STATE COURTS DOES NOT AUTHORIZE CREATION OF SUBSTANTIVE RIGHTS.**

As, under Const. art. 6, cl. 2, declaring the Constitution and the laws adopted in pursuance thereof the supreme law of the land, the state courts may, and unless inhibited must, apply federal laws, a mere reservation of partially concurrent jurisdiction to such courts by an act of Congress conferring an otherwise exclusive jurisdiction on national courts cannot create substantive rights or obligations or indicate assent to their creation by the states.

**3. STATUTES ⇐228—OBJECT OF SAVING CLAUSE IS NOT TO CREATE.**

The usual function of a saving clause in a statute is not to create anything, but to preserve something from immediate interference.

**4. STATUTES ⇐216—ERRONEOUS LEGISLATIVE CONSTRUCTION DOES NOT ALTER LAW.**

An expression by the Legislature of an erroneous opinion concerning the law does not alter it.

**5. ADMIRALTY ⇐1—SAVING REMEDIES UNDER STATE WORKMEN'S COMPENSATION LAWS FOR MARITIME INJURIES UNCONSTITUTIONAL.**

Act Oct. 6, 1917, amending Judicial Code, §§ 24, 256 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 991[3], 1233), relative to the jurisdiction of federal courts, so as to save to suitors in all cases the right of a common-law remedy, etc., "and to claimants the rights and remedies under the workmen's compensation law of any state," seeks to authorize and sanction action by the states in prescribing and enforcing rights, obligations, liabilities, and remedies designed to provide compensation for injuries to employés engaged in maritime work, and, as so construed, is beyond the power of Congress, as its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement cannot be delegated to the states, especially as it would destroy the uniformity contemplated by the Constitution.

Mr. Justice Pitney, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

In Error to the Supreme Court of the State of New York, Appellate Division, Third Department.

Proceeding by Lillian E. Stewart for compensation under the Workmen's Compensation Law for the death of her husband, William M. Stewart, opposed by the Knickerbocker Ice Company, employer. Compensation was awarded, and the award affirmed by the Appellate Division (187 App. Div. 915, 173 N. Y. Supp. 924), and by the Court of Appeals (226 N. Y. 302, 123 N. E. 382), and the employer brings error. Reversed and remanded with directions.

\*150

\*Mr. Frank R. Savidge, of New York City, for plaintiff in error.

\*152

\*Mr. E. Clarence Aiken, of Albany, N. Y., for defendant in error.

\*155

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson river and drowned—August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York (Consol. Laws N. Y. c. 67); the Industrial Commission granted an award against the company for her and the minor

\*156

children; and both Appellate Division and the Court of Appeals approved it. *Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employé engaged in maritime work—*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900—had been extinguished by "An act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any state," approved October 6, 1917. 40 Stat. 395, c. 97 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 991 [3], 1233).

The provision of section 9, Judiciary Act 1789 (1 Stat. 76, c. 20), granting to United States District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, \* \* \* saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," was carried into the Revised Statutes (sections 563 and 711 [Comp. St. §

1233]) and thence into the Judicial Code (clause 3, sections 24 and 256 [Comp. St. § 991(3), 1233]). The saving clause remained unchanged until the statute of October 6, 1917, added "and to claimants the rights and remedies under the workmen's compensation law of any state."<sup>1</sup>

\*157

\*In *Southern Pacific Co. v. Jensen* (May, 1917) 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, we declared that under section 2, article 3, of the Constitution ("The judicial power shall extend to \* \* \* all cases of admiralty and maritime jurisdiction"), and section 8, article 1 (Congress may make neces-

sary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes

\*158

part of our \*national law applicable to the matters within admiralty and maritime jurisdiction"; also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish, and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In *Chelentis v. Luckenbach S. S. Co.* (June, 1918) 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said:

"Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and

\*159

definitely \*change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.'"

And concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this:

"In *Southern Pacific Co. v. Jensen* we definitely ruled that it gave no authority to the several states to enact legislation which would work 'material prejudice to the characteristic features

jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.'

"Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"'Third. Of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state.'"

<sup>1</sup> Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73, 76, 77:

"Sec. 9. That the District Courts shall have, exclusively of the courts of the several states, \* \* \* exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. \* \* \*"

Rev. Stats. § 563:

"The District Courts shall have jurisdiction as follows: \* \* \*

"Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine."

Rev. Stats. § 711:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: \* \* \*

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

The Judicial Code—

Section 24: "The District Courts shall have original jurisdiction as follows: \* \* \*

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. \* \* \*"

"Section 256:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: \* \* \*

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it."

Act Oct. 6, 1917, c. 97, 40 Stat. 395:

"That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"'Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state; of all seizures on land or waters not within admiralty and maritime



of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." "Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled:

"The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of

\*160

\*California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

See, also, *The Black Heath*, 195 U. S. 361, 365, 25 Sup. Ct. 46, 47, 49 L. Ed. 236.

[1] As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

"That we have a maritime law of our own, operative throughout the United States, cannot

\*161

\*be doubted. \* \* \* One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654).

The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York City*, 179 U. S. 552, 557, et seq., 21 Sup. Ct. 212, 45 L. Ed. 314.

[2] The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten; also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, art. 6, clause 2; *Second Employers' Liability Cases*, 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the states.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell* (D. C.) 257 Fed. 578, and *Rohde v. Grant Smith Porter Co.* (D. C.) 259 Fed. 304, illustrate some of the uncer-

\*162

tainities. In the \*first, the District Court in New York dismissed a libel, holding that rights and remedies prescribed by the compensation law of that state are exclusive and pro tanto supersede the maritime law. In the second, the District Court of Oregon ruled that when an employé seeks redress for a maritime tort by an admiralty court, rights, obligations and liabilities of the respective

parties must be measured by the maritime law and these cannot be barred, enlarged or taken away by state legislation. Other difficulties hang upon the unexplained words "workmen's compensation law of any state."

[3, 4] Moreover, the act only undertook to add certain specified rights and remedies to a saving clause within a Code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount federal law—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the Legislature of an erroneous opinion concerning the law does not alter it. *Endlich, Interpretation of Statutes*, § 372.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record (65th Cong. pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee,

\*163

tee, copied below,<sup>2</sup> \*probably indicates the

<sup>2</sup> 65th Congress, 1st Session. Senate Report No. 139. Amending the Judicial Code. October 2, 1917. —Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following Report [to accompany S. 2916]:

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any state, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saying to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co. v. Jensen* that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any state. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill, if enacted, will not disrupt the admiralty jurisdiction of the federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, state and federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts, it will now be possible for the state, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

general legislative purpose. And, with this and accompanying circumstances, the words must be read.

[5] Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, lia-

\*164

bilities \*and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed, except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission* (Cal.) 188 Pac. 803.

Congress cannot transfer its legislative power to the states—by nature this is non-delegable. In *re Rahrer*, 140 U. S. 545, 560, 11 Sup. Ct. 865, 35 L. Ed. 572; *Field v. Clark*, 143 U. S. 649, 692, 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. Ed. 525; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126, 25 Sup. Ct. 211, 49 L. Ed. 409; *Interstate Com. Comm. v. Goodrich, Transit Co.*, 224 U. S. 194, 214, 32 Sup. Ct. 436, 56 L. Ed. 729.

In *Clark Distilling Co. v. Western Md. Ry.*

\*165

*Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, notwithstanding the contention that it



violated the Constitution—article 1, § 8, cl. 3—this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one state into another when intended for use contrary to the latter's laws. Among other things, it was there stated that—

"The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress"—i. e., Congress itself forbade shipments of a designated character.

And further:

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest"—i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that, because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less.

"We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that, if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that, because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power."

See *Delamater v. South Dakota*, 205 U. S. 93, 97, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733.

\*166

\*Here we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and the power of a state to supplement the maritime law to that extent was recognized. But here the state enact-

ment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See *N. Y. Cent. R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *N. Y. Cent. R. R. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; *Southern Pacific Co. v. Jensen*, supra. The doctrine of *The Hamilton* may not be extended to such a situation.

The judgment of the court below must be reversed, and the cause remanded, with directions to take further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice HOLMES, dissenting.

In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, the question was whether there was anything in the Constitution or laws of the United States to prevent a State from imposing upon an employer a limited but absolute liability for the death of an employé upon a gang-plank between a vessel and a wharf, which the

\*167

State unquestionably could have imposed had the death occurred on the wharf. A majority of the Court held the State's attempt invalid, and thereupon, by an Act of October 6, 1917, c. 97, 40 Stat. 395, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, c. 231; 36 Stat. 1087. Those sections in similar terms declared the jurisdiction of the District Court and the exclusive jurisdiction of the Courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation law of any State." I thought that claimants had those rights before. I think that they do now both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial Power shall extend \* \* \* to all Cases of admiralty and maritime Jurisdiction," Const. Art. 3, § 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it,

and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced and cannot have been elicited by logic alone from the mediaeval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used

\*168

by the \*several States—a not unfamiliar form of law. *Gibbons v. Ogden*, 9 Wheat. 1, 207, 6 L. Ed. 23; *Hobart v. Drogan*, 10 Pet. 108, 119, 9 L. Ed. 363; *Cooley v. Board of Wardens*, 12 How. 299, 317, 318, 13 L. Ed. 996; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 84, 85, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; *Franklin v. United States*, 216 U. S. 570, 30 Sup. Ct. 434, 54 L. Ed. 615; *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 237 U. S. 300, 303, 35 Sup. Ct. 598, 59 L. Ed. 965. An Act of Congress, we always say, will be construed so as to sustain it, if possible and therefore if it were necessary, the words "rights and remedies under the workmen's compensation law of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See *United States v. Paul*, 6 Pet. 141, 8 L. Ed. 348. Taking the act as so limited it is to be read as if it set out at length certain rules for New York, certain others more or less different for California, and so on. So construed the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument so far as I now remember, are duties, imposts and excises, naturalization and bankruptcy, in Article 1, § 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the Fourteenth Amendment seems to me extravagant. Indeed it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common law remedy adopted the common law of the several States within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. *Steamboat Co. v. Chase*, 16 Wall. 522, 530-534, 21 L. Ed. 369; *Knapp, Stone & Co. Co. v. McCaffrey*, 177 U. S. 638, 645, 646, 20 Sup. Ct. 824, 44 L. Ed. 921; *Rounds v. Cloverport*

\*169

*Foundry & Machine Co.*, 237 U. S. 303, 307, 35 Sup. Ct. 596, 59 L. Ed. 966. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities

with perhaps widely different needs. See *United States v. Press Publishing Co.*, 219 U. S. 1, 9, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann. Cas. 942.

I thought that *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it. But I can see no constitutional objection to such an adoption in this case if the Act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common law practice, &c., in the District Courts to 'conform, as near as may be, to the practice, &c., existing at the time' in the State Courts. Rev. Sts. § 914 (Comp. St. § 1537). This was held by the unanimous Court to be binding in *Amy v. Watertown*, No. 1, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946. See *Gibbons v. Ogden*, 9 Wheat. 1, 207, 208, 6 L. Ed. 23; *Cooley v. Board of Wardens*, 12 How. 299, 317, 318, 13 L. Ed. 996. I have mentioned the scope given to the saving of a common law remedy and have referred to cases on the statutes adopting State pilotage laws. Other instances are to be found in the Acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of

\*170

\*want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Constitution, 'The judicial Power shall extend to \* \* \* all Cases of admiralty and maritime Jurisdiction' prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act—if not in its present form, at least in the form in which it stood on October 6, 1917. I am of opinion that the New York law at the time of the trial should be applied and that the judgment should be affirmed.

Mr. Justice PITNEY, Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this opinion.



(253 U. S. 142)

O'CONNELL et al. v. UNITED STATES.

(Argued April 23 and 26, 1920. Decided May 17, 1920.)

No. 221.

1. CRIMINAL LAW  $\hookrightarrow$ 1092(9)—COURT WITHOUT POWER TO SETTLE BILL OF EXCEPTIONS AFTER TIME AS EXTENDED WITHIN TERM.

Where the term of court at which defendants were convicted, as extended by a rule of the District Court, expired December 4th, and the last order prior to that time, extending the time for preparing the bill of exceptions, extended the time to December 14th, the court's power over the cause expired not later than December 14th, and any proceedings thereafter concerning settlement of the bill were coram non iudice, and did not justify consideration of the bill.

2. ARMY AND NAVY  $\hookrightarrow$ 20, 40—WAR  $\hookrightarrow$ 4—SELECTIVE SERVICE AND ESPIONAGE ACTS VALID.

The Selective Service Law of May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), and the Espionage Act of June 15, 1917, are constitutional.

3. CONSPIRACY  $\hookrightarrow$ 34—CONSPIRING TO OBSTRUCT RECRUITING AND ENLISTMENT BY PERSUASION UNLAWFUL.

A conspiracy to obstruct recruiting and enlistment by persuasion constitutes a crime under Espionage Act, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).

4. CRIMINAL LAW  $\hookrightarrow$ 878(2)—VERDICT WITH BLANKS HELD A GENERAL VERDICT OF GUILTY ON BOTH COUNTS.

Under an indictment charging in one count a conspiracy to obstruct the recruiting and enlistment service, and in the second count a conspiracy to make false certificates concerning liability for military service and to aid in evading the Selective Service Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), a verdict finding defendants "guilty on the — count of the indictment and — on the — count of the indictment" sufficiently showed an intention to find a general verdict of guilty upon both counts, especially where no objection was made to the form of the verdict by the motion for new trial or in arrest of judgment.

5. ARMY AND NAVY  $\hookrightarrow$ 40—PENAL PROVISIONS OF SELECTIVE SERVICE ACTS NOT LIMITED TO OFFICIALS.

The clause of Selective Service Act, § 6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044f), making it an offense for any person to make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service, or otherwise to evade or aid another to evade the requirements of that act or the regulations thereunder, is not limited to officers and persons charged with the duty of carrying the act into effect.

In Error to the District Court of the United States for the Northern District of California.

Daniel O'Connell and others were convicted of offenses, and they bring error. Affirmed.

\*144

\*Messrs. Gilbert E. Roe, of New York City, T. C. West and Daniel O'Connell, both of San Francisco, Cal., and Joseph L. Tepper, of Washington, D. C., for plaintiffs in error.

Mr. Assistant Attorney General Stewart, for the United States.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiffs in error were tried under an indictment with two counts. The first charges a conspiracy to violate the Espionage Act—section 3, Act June 15, 1917, c. 30, 40 Stat. 217, 219 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c)—by obstructing the recruiting and enlistment service; the second a conspiracy to violate the Selective Service Law—section 6, Act May 18, 1917, c. 15, 40 Stat. 76, 80 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044f).

A demurrer, challenging the constitutionality of both acts and the sufficiency of each count, was overruled.

The trial continued from September 12 to 25, 1917, and resulted in the following verdict:

"We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wachter, Thomas Carey and E. R. Hoffman, the defendants at the bar, guilty on the — count of the indictment, and — on the — count of the indictment.

"Thomas H. Haskins, Foreman."

No objection was made to this verdict when returned, nor at any time prior to May 31, 1919, long after the record came here, when permission was asked to amend the assignments of error.

Motions for new trial and in arrest of judgment were overruled. The former attacked the verdict as contrary to law and the evidence but said nothing concerning its form. The latter recited:

"And now after verdict against the said defendants and before sentence, come the said defendants in their own proper persons and by Daniel O'Connell their attorney and move the court here to arrest judgment herein and not pronounce the same"

\*145

—\*and specified the following grounds: (1) The indictment fails to set forth facts sufficient to constitute an offense. (2) The first count is repugnant to itself for reasons set forth in the demurrer. (3) The second count is based on the Act of May 18, 1917, inapplicable to the defendants because they were not engaged in carrying out its terms. (4) The first count does not adequately inform defendants concerning nature of charge against them. (5) Both the Acts of May 18

and June 15, 1917, are in conflict with the Constitution and are invalid.

September 29 O'Connell was sentenced to the penitentiary for five years on the first count and for two years on the second, the terms to run consecutively. The other plaintiffs in error were sentenced to varying concurrent terms under both counts, none being in excess of three years. On the same day a writ of error from this court was allowed.

The record contains a bill of exceptions, with an elaborate explanatory certificate signed by the District Judge.

The trial took place during July term, 1917; the next term as appointed by statute began November 15. On September 29, 30 days were granted for preparation and presentation of a bill of exceptions. October 23 an order undertook to extend the time to November 15; on November 12 a like order specified November 27; on November 26 an order specified December 15; on December 14 a further order undertook to extend it to December 24, when a still further extension was ordered to December 31. On the latter date a proposed bill was presented. January 9, 1918, the United States attorney procured an order granting time in which to prepare amendments to the proposed bill which were thereafter presented.

Rule 9 of the District Court provided:

"For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which

any judgment or decree is entered, each \*term of this court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered."

Rule 61 provided:

When an act to be done in any pending suit relates to the preparation of bills of exceptions or amendments thereto, "the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but no such extension or extensions shall exceed thirty days in all without the consent of the adverse party."

After expiration of the three months specified by rule 9, plaintiffs in error having in open court requested further extension, the United States attorney announced that he would not consent but would ask the court to refuse to settle any bill thereafter proposed. In April, 1918, he moved that settlement of the proposed bill be refused and that it be stricken from the files. The court expressed the opinion that the bill was too late unless the United States attorney had waived objection thereto, and on that point said:

"I am very strongly of the view that owing to the attitude of the United States attorney, distinctly stated theretofore, which was all that

could be done under the circumstances this was not such a waiver."

But, in order that the matter might be brought here for final determination, the facts were set out and the certificate signed.

[1] Under the statute the trial term expired November 15; but, for the purpose of filing the bill of exceptions, a general rule extended it to December 4—three months from the first Tuesday in September. The last order of court within the extended term designated December 14 as the final day for action.

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the

\*147 trial, and were also embodied in a \*formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties. \* \* \* After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." Michigan Insurance Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 452 (36 L. Ed. 162).

We think the power of the trial court over the cause expired not later than the 14th of December, 1917, and any proceedings concerning settlement of a bill thereafter were coram non judge. We may not, therefore, consider the bill copied in the record. *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453; *Jennings v. Philadelphia, Baltimore & Washington Ry. Co.*, 218 U. S. 255, 257, 31 Sup. Ct. 1, 54 L. Ed. 1031. And the same is true of certain notes of proceedings taken during trial which we directed to be brought here, without prejudice, by order of June 9, 1919.

The motion to amend original assignments of error is granted. Having regard to the record properly before us only four of the assignments require special notice: (1) Unconstitutionality of the Selective Service and the Espionage Acts. (2) That the first count is bad because it only charges a conspiracy to obstruct the recruiting and enlistment service by inducement and persuasion. (3) The verdict was fatally defective and the judgment invalid. (4) The second count is bad. It charges a conspiracy to make false certificates concerning liability for military service and to aid in evading the act without alleging that the conspirators were officers or persons charged with the duty of carrying it into effect.

[2, 3] The constitutionality of the two acts



\*148

is settled by opinions of this court announced since the writ of error was sued out. *Goldman et al. v. United States*, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. 410; *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. Also the criminality of a conspiracy to obstruct recruiting and enlistment by persuasion has been determined. *Schenck v. United States*, supra.

[4] Apparently a printed form was used in preparing the jury's verdict, defendants' names and the word "guilty" being inserted. When presented no objection was made to its form or wording, neither the motion for new trial nor in arrest of judgment indicated any such objection, and plaintiffs in error mentioned none when called upon to show cause why sentence should not be imposed. We think the intention to find a general verdict of guilty upon both counts is sufficiently plain. Evidently all parties so understood at the time. See *Statler v. United States*, 157 U. S. 277, 279, 15 Sup. Ct. 616, 39 L. Ed. 700; *Ballew v. United States*, 160 U. S. 187, 197, 16 Sup. Ct. 263, 40 L. Ed. 388.

[5] The second count charges a conspiracy to violate section 6 of the Selective Service Act. Its provisions include:

"Any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations."

Other words of the section relate to officers and persons charged with the duty of carrying the act into effect, but the quoted ones are broad enough to include nonofficial persons and, when considered in connection with the general purpose in view, there can be no reasonable doubt that plaintiffs in error were within their meaning. See *Fraina et al. v. United States*, 255 Fed. 28, 33, 166 C. C. A. 356.

We find no adequate cause for interfering with the judgment of the court below and it is

Affirmed.

(253 U. S. 94)

LEARY et al. v. UNITED STATES.

(Argued April 30, 1920. Decided May 17, 1920.)

No. 314.

1. PRINCIPAL AND SURETY ⇐185—SURETY NOT ENTITLED TO REIMBURSEMENT FROM INDEMNITY FUND FOR EXPENSES OF OPPOSING COLLECTION OF JUDGMENT.

Where a fund which the United States sought to charge with a trust in its favor was

determined to be primarily security to L. upon a bail bond and judgment was obtained on the bail bond which L.'s estate was compelled to pay, his administrators were not entitled to reimbursement from the fund for their expenses in defending against proceedings to compel payment of the judgment, though the United States had impounded the fund, as the obligation to pay the judgment was absolute and not confined to a payment from such fund.

2. DEPOSITS IN COURT ⇐11—CLERK HELD ENTITLED TO POUNDAGE ON AMOUNT AWARDED TO PARTY.

Where a fund which the United States impounded and sought to charge with a trust in its favor was determined to be primarily security to L. against his liability upon a bail bond, the amount awarded to L.'s administrators on their payment of a judgment on the bail bond was properly subjected to the clerk's poundage for money kept and paid out by him.

3. PRINCIPAL AND SURETY ⇐185—SURETY NOT ENTITLED TO REIMBURSEMENT FROM INDEMNITY FUND FOR COST OF ESTABLISHING RIGHTS.

Where the United States sought to establish a trust in a fund obtained from it through fraud, and L. intervened claiming that the fund was held to secure him against liability upon a bail bond and that he was a purchaser without notice of the rights of the United States, and it was determined that the fund was primarily security to him against such liability, he was not entitled to reimbursement from the fund for his expenses in establishing and protecting the trust in his favor, on the theory that the rights of the United States were inferior to his, as this would impose on the owner of the fund charges of a kind that the United States never pays, and charges for protecting the fund not for, but against, the United States.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Suit by the United States against Benjamin D. Greene and others, in which Daniel J. Leary and another, administrators of James D. Leary, deceased, intervened. A decree granting the interveners insufficient relief was affirmed by the Circuit Court of Appeals (257 Fed. 246, 168 C. C. A. 330), and they appeal. Affirmed.

Mr. Aubrey E. Strode, of Amherst, Va., for appellants.

Mr. Marion Erwin, of New York City, for the United States.

\*95

\*Mr. Justice HOLMES delivered the opinion of the Court.

The United States brought a bill to charge Kellogg with a trust in respect of funds received by him from Greene and obtained from the plaintiff by Greene through his participation in some well known frauds. In 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029, the representative of Leary was allowed to intervene and to assert a paramount claim upon the funds. In United

States v. Leary, 245 U. S. 1, 38 Sup. Ct. 1, 62 L. Ed. 113, it was established that the funds were held by Kellogg primarily as security to Leary against his liability upon a bail bond for Greene. The United States having obtained a judgment on the bail bond and the same having been paid by the Leary estate the present appellants filed a petition in the cause, in the District Court, to have the funds applied to the reimbursement (1) of expenditures in defending against proceedings in the Surrogate Court to secure payment of the judgment; (2) of expenditures in establishing and protecting the trust; and (3) of the sum of \$40,802, the amount paid on the judgment, with interest from July 26, 1910, the date when the judgment was paid. The District Court allowed the last claim with interest at six per cent. less the clerk's poundage of one per cent. under Rev. St. § 828 (Comp. St. § 1383). (The details are immaterial.) It denied the other claims, and its decree was affirmed by the Circuit Court of Appeals. 257 Fed. 246, 168 C. C. A. 330. Leary's administrators appealed.

[1-3] The only reason suggested for the claim on account of defending against proceedings on the judgment is that the United States in the present suit had impounded the funds available for payment. But the obligation to pay the judgment was absolute, not confined to a payment from these funds, and the claim for the cost of resisting it has no foundation. We also are of opinion that the deduction of poundage by the clerk was prop-

\*96

er as in other \*cases of money kept and paid out by him. But it is said that this item and the expense of defending the trust should be borne by the residue of the funds in the clerk's hands after deducting the amount paid in respect of the judgment. It is argued that the trust informally established by letters of Kellogg stating that he held it for Leary's protection to be applied in payment of his obligation in case it should be established, if construed with reasonable liberality, must embrace these elements to make the protection complete. Of course the upholding of Leary's claim against the United States was not contemplated in the terms of the trust because Leary's ignorance of the interest of the United States was essential to the validity of his position as a purchaser without notice. But it is thought that indemnity includes defences of the indemni-

fying fund against unexpected attacks, that if the trustee fails to make it the cestui que trust may do so, and that in either event the fund should be charged. It does not matter that the United States is the opposing party, as its rights in the fund are inferior to those that Leary now has successfully affirmed. Trustees of the Internal Improvement Fund of the State of Florida v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

To these arguments the Government replies in the first place that they come too late; that the decree of the Circuit Court of Appeals that was before this court on the last occasion was treated as a final decree, which therefore fixed the amount that the appellants could recover beyond enlargement, and that as the prayer of the appellants was only for the transfer of so much of the fund as would pay the judgment on the bail bond with interest, nothing more can be asked now. This objection might raise difficulty if otherwise our opinion were in favor of the appellants; but as we think that the Circuit Court of Appeals was right with regard to the merits, we will assume for purposes of decision that the previous proceeding did not so precisely determine the appellants'

\*97

\*rights as to prevent their demanding the foregoing items as incident to the claim allowed.

To charge the fund with these expenses is to charge the United States, and it begs the question to say that the United States in this respect is subordinate to the Leary claim. It is not subordinate unless Leary's costs ought to come out of the Government's pocket, even though limited to particular money there. The Government cannot be made to pay or to take subject to the deduction, because Leary, even though a bona fide purchaser, had no contract for it, and because to charge the fund apart from contract is merely a round-about way of saying that the owner of the fund must pay charges of a kind that the United States never pays; (see National Bank of Genesee v. Whitney, 103 U. S. 103, 104, 26 L. Ed. 443; United States v. Barker, 2 Wheat. 395, 4 L. Ed. 271) and charges for protecting the fund not for but against the United States.

Decree affirmed.

Mr. Justice McREYNOLDS took no part in the decision of this case.



(253 U. S. 113)

UNITED STATES et al. v. ALASKA S. S. CO. et al.

(Argued Dec. 16 and 17, 1919. Decided May 17, 1920.)

No. 541.

1. APPEAL AND ERROR 781(4)—TRANSPORTATION ACT HELD TO RENDER APPEAL MOOT AND TO REQUIRE DISMISSAL OF PETITION WITHOUT PREJUDICE.

The questions involved on an appeal from an order enjoining the enforcement of an order of the Interstate Commerce Commission, prescribing the terms of carriers' bills of lading, become moot, where it is conceded that Transportation Act Feb. 28, 1920, requires changes in the forms prescribed; and the order will be reversed, and the cause remanded, with directions to dismiss without prejudice.

2. APPEAL AND ERROR 843(1)—MOOT QUESTIONS WILL NOT BE DECIDED, HOWEVER CONVENIENT SUCH DECISION MIGHT BE.

The Supreme Court will determine only actual matters in controversy essential to the decision of the particular case before it, and where by an act of the parties or a subsequent law the existing controversy has come to an end the case becomes moot, and will be treated accordingly, however convenient it might be to have the questions decided for the government of future cases.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Alaska Steamship Company and others against the United States and another. From an order granting an injunction pendente lite, and denying a motion to dismiss (259 Fed. 713), defendants appeal. Reversed and remanded, with directions.

\*114

\*Messrs. Charles W. Needham, of Washington, D. C., and Alexander C. King, Sol. Gen., of Atlanta, Ga., for appellants.

Messrs. Roscoe H. Hupper, of New York City, and Theodore W. Reath, of Philadelphia, Pa., for appellees.

Mr. Justice DAY delivered the opinion of the Court.

A petition was filed in the United States District Court for the Southern District of New York by numerous interstate carriers and carriers by water against the United States and the Interstate Commerce Commission to set aside an order of the Interstate Commerce Commission dated March 14, 1919, requiring the carriers to use two certain modified bills of lading, one pertaining to domestic and the other to export transportation. The cause came on for hearing upon application for a temporary injunction and upon a motion to dismiss the petition. The hearing was had before three judges, a Circuit Judge and two District Judges. A majority concurred in holding that the Interstate Commerce Commission had no authority to pre-

scribe the terms of carrier's bills of lading, and that in any event there was no power to prescribe an inland bill of lading depriving the carriers of the benefits of certain statutes of the United States limiting the liability of vessel owners. Alaska S. S. Co. v. U. S. (D. C.) 259 Fed. 713. One of the District Judges dissented, holding that the Commission had the power to prescribe bills of lading, and that the particular bills of lading in question were within the authority of the Commission. An order was entered refusing to dismiss the petition, and an injunction pendente lite was granted. From this order an appeal was taken directly to this court under the statute of 1913. 38 Stat. 220.

\*115

\*It appears that the matter in controversy as to the authority of the Commission and the character of the bills of lading were subjects of much inquiry before the Commission, where hearings were had, and an elaborate report upon the proposed changes in carriers' bills of lading resulted in the adoption by the Commission of the two bills of lading. 52 Interst. Com. Com'n R. 671.

Pending this appeal Congress passed on February 28, 1920, the act known as the "Transportation Act of 1920," which terminated the federal control of railroads, and amended in various particulars previous acts to regulate interstate commerce. In view of this act of Congress this court on March 22, 1920, entered an order requesting counsel to file briefs concerning the effect of the act upon this cause. Briefs have been filed, and we now come to consider the altered situation arising from the new legislation, and what effect should be given to it in the disposition of this case.

The thing sought to be accomplished by the prosecution of this suit was an annulment of the order of the Commission, and an injunction restraining the putting into effect and operation of such order, which prescribed the two forms of bills of lading. The temporary injunction granted was against putting into effect the Commission's order prescribing the forms of the bills of lading.

[1, 2] The Transportation Act of 1920, passed pending this appeal, makes it evident (and it is in fact conceded in the brief filed by appellants) that changes will be required in both forms of bills of lading in order that they may conform to the requirements of the statute. We need not now discuss the details of these changes. It is sufficient to say that the act requires them as to both classes of bills. We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellant's brief it is insisted that the power of the Commission to prescribe bills

\*116

of lading is still existent, \*and has not been

modified by the provisions of the new law. But that is only one of the questions in the case. It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314, 13 Sup. Ct. 876, 878 (37 L. Ed. 747); *United States v. Hamburg American Line*, 239 U. S. 466, 475, 476, 36 Sup. Ct. 212, 60 L. Ed. 387, and previous cases of this court therein cited.

In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation having that effect renders the case moot. *Berry v. Davis*, 242 U. S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441.

In our view the proper course is to reverse the order, and remand the cause to the court below with directions to dismiss the petition, without costs to either party, and without prejudice to the right of the complainants to assail in the future any or-

\*117

der of the Commission prescribing bills of lading after the enactment of the new legislation. *United States v. Hamburg American Line*, supra; *Berry v. Davis*, supra.

And it is so ordered.

(253 U. S. 90)

WHITE, Immigration Com'r, v. CHIN FONG.

(Argued April 22, 1920. Decided May 17, 1920.)

No. 506.

ALIENS  27—CHINESE MERCHANT TEMPORARILY ABSENT COULD NOT BE EXCLUDED, AND WAS DEPORTABLE ONLY BY JUDICIAL PROCEEDING.

Under Act Nov. 3, 1893 (Comp. St. §§ 4320, 4324), requiring a Chinaman, applying for ad-

mission on the ground that he was formerly engaged in the United States as a merchant, to establish the fact that he was such for at least one year before his departure, one who had been a merchant for at least one year before his departure for China with the intention of returning could not be excluded on his return by the immigration officials, on the ground that his original entry was fraudulent, but could be deported only by a judicial proceeding.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Habeas corpus by Chin Fong against Edward White, Commissioner of Immigration for the Port of San Francisco. A judgment remanding the petitioner to custody was reversed by the Circuit Court of Appeals (258 Fed. 849, 169 C. C. A. 569), and defendant brings certiorari. Affirmed.

See, also, 250 U. S. 656, 40 Sup. Ct. 14, 63 L. Ed. 1192.

\*91

\*Mr. Assistant Attorney General Stewart, for petitioner.

Mr. J. H. Ralston, of Washington, D. C., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Certiorari to review a judgment of the Court of Appeals discharging respondent from the custody of the Commissioner of Immigration, he holding respondent for deportation as a Chinese person not entitled to be in the United States. 258 Fed. 849, 169 C. C. A. 569. The judgment of the Court of Appeals reversed that of the District Court, the latter court having remanded respondent to the custody of the Commissioner for deportation.

The evidence establishes the fact that respondent entered the United States as a merchant and was such at a fixed place of business for at least a year before his departure for China and that his stay in China was intended to be temporary. He hence contends that the Commissioner, as representing the executive branch of the government, had no authority to determine that his original entry was unlawful. This contention the District Court ruled against and the Circuit Court of Appeals ruled in favor of, and constitutes the question in the case. The Circuit Court of Appeals, by Circuit Judge Morrow, passing upon it said:

"The acting Secretary of Labor in approving the decision of the Commissioner of Immigration did so upon the ground that 'the original entry of this man [respondent] was obtained by fraud,' but this was not the question submitted to the Commissioner of Immigration or to the

\*92

Secretary of Labor for \*decision. The question was not whether the applicant was legally admitted in 1896-1897 or 1906. The question was whether he had been a merchant in the United States at least one year before his departure



from the United States in 1912. *Chin Fong v. Backus*, 241 U. S. 1-5, 36 Sup. Ct. 490, 60 L. Ed. 859."

And upon that question it was decided that—

"The evidence was all one way, establishing beyond controversy all of the facts required by the statute and the rule of the Department of Labor."

The conclusion was that the Commissioner did not consider this evidence or pass upon it, but deciding that appellee's original entry was fraudulent, ordered his deportation. In other words, it was held that the Commissioner ignored the question presented to him and the evidence pertaining to it, reviewed and reversed the judgment of another time and tribunal, took away the right that had been exercised under it and which gave the assurance that respondent could go to China and return again. The order of deportation was, therefore, declared to be void. For this the court cited the case of *Chin Fong v. Backus*, supra, 241 U. S. 1, 36 Sup. Ct. 490, 60 L. Ed. 859, and the various statutes applicable to the exclusion of Chinese persons from entry into the United States. 22 Stat. 58 (Comp. St. §§ 4290-4302, 4359); 23 Stat. 115 (Comp. St. § 4290 et seq.); 25 Stat. 476 (Comp. St. §§ 4306-4314); 31 Stat. 1093 (Comp. St. §§ 4332-4334); and the Act of Nov. 3, 1893, 28 Stat. 7 (Comp. St. §§ 4320, 4324).

In the case of *United States v. Woo Jan*, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who has been in the United States and has departed from it with the intention of returning, is entitled under existing legislation to have his right to do so judicially investigated with "its assurances

\*93

and sanc\*tions," as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action.

And such is the provision of the Act of November 3, 1893 (28 Stat. 7). It is there provided that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant, must establish the fact by two credible witnesses, other than Chinese, that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except what was necessary in the conduct of his business.

The government appeals against the explicit words of the provision to the purpose of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or, if they fraudulently enter, to expel them, and it is insisted that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention it is urged, should not be ascribed to the laws, and in emphasis, it is said, "such a legislative absurdity is unthinkable." But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this court has declared, and in the present case, the right that had been adjudged and had been exercised in reliance upon the adjudication.

Judgment affirmed.

(253 U. S. 77)

ERIE R. CO. v. COLLINS.

(Argued Jan. 8, 1920. Decided May 17, 1920.)

No. 348.

1. COMMERCE ⇨27(5)—TEST OF EMPLOYÉ'S ENGAGEMENT IN INTERSTATE COMMERCE STATED.

Whether a railroad employé is engaged in interstate commerce depends on whether the work being done is so closely related to interstate commerce as to be practically a part of it.

2. COMMERCE ⇨27(5)—EMPLOYÉ OPERATING PUMPING PLANT SUPPLYING WATER TO ENGINES ENGAGED IN INTERSTATE COMMERCE.

A railroad employé, operating a signal tower and a pumping station, consisting of water tank and an engine for pumping purposes, through which instrumentalities water was supplied to engines whether engaged in interstate commerce or intrastate commerce, was engaged in interstate commerce while in attendance at the pumping station.

3. CERTIORARI ⇨64(1)—CLAIMS OF ERROR NOT ARGUED OR SUBMITTED ASSUMED ABANDONED.

Claims of error neither argued nor submitted may be assumed abandoned.

4. DAMAGES ⇨51—SHAME AND HUMILIATION FROM INJURY CAUSING DISFIGUREMENT ELEMENT OF DAMAGE.

Damages are recoverable for the shame and humiliation caused by an injury resulting in personal mutilation or disfigurement, notwithstanding the claimed difficulty of contradicting or rebutting evidence concerning mental suffering; that being a matter for the jury's consideration.

Mr. Justice Van Devanter and Mr. Justice Pitney dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by William M. Collins against the Erie Railroad Company. A judgment for plaintiff (245 Fed. 811) was affirmed by the Circuit Court of Appeals (259 Fed. 172, 170 C. C. A. 240), and defendant brings certiorari. Affirmed.

See, also, 250 U. S. 637, 39 Sup. Ct. 490, 63 L. Ed. 1183.

Messrs. John W. Ryan and Adelbert Moot, both of Buffalo, N. Y., for petitioner.

Mr. Hamilton Ward, of Buffalo, N. Y. (Mr. Irving W. Cole, of Buffalo, N. Y., of counsel), for respondent.

\*80

\*Mr. Justice McKENNA delivered the opinion of the Court.

Action for damages under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) brought in the District Court for the Western District of New York.

The following are the allegations of the complaint stated narratively:

December 25, 1915, and prior thereto, defendant was an operator of a steam railroad and engaged in interstate commerce. On and prior to that date plaintiff as an employé of defendant operated a signaling tower and water tank in the town of Burns, N. Y., the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a closely well into the tank by a gasoline engine which plaintiff ran.

In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine the gasoline suddenly exploded burning him and seriously and painfully and permanently injuring him, causing him immediate and permanent suffering and the expenditure of large sums of money, by all of which he was damaged in the sum of \$25,000.

The engine was defective, which was the cause of the explosion, plaintiff being guilty of no negligence.

Judgment was prayed in the sum of \$25,000.

Defendant by demurrer attacked the sufficiency of the complaint and the jurisdiction of the court.

The court (Judge Hazel) overruled the demurrer but in doing so expressed the conflicting considerations which swayed for and against its strength but finally held the complaint sufficient, "and that plaintiff was engaged in interstate commerce or that his work was so closely connected therewith as

\*81

to be a part of it." To this conclusion \*the court seemed to have been determined by *Pedersen v. D. L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

Defendant answered putting at issue the allegations of the complaint, and set up as separate defenses assumption of risk and contributory negligence.

A trial was had to a jury, during the course of which it was stipulated that at the time of plaintiff's injury and prior thereto

"trains carrying interstate commerce ran daily" and at such times "water from the water tank was supplied daily in part to defendant's engines engaged in interstate commerce and in part to engines hauling intrastate freight."

Motions for nonsuit and for a directed verdict were successively made and overruled.

The jury returned a verdict for plaintiff in the sum of \$15,000 upon which judgment was entered against motion for arrest and new trial.

Error was then prosecuted to the Court of Appeals, which court affirmed the judgment, and to review its action this certiorari was granted.

The evidence presents very few matters of controversy. It establishes the employment of plaintiff by defendant, and its character, and presents the question whether it was in interstate commerce or intrastate commerce, in both of which, it is stipulated, defendant was engaged. And on this question the courts below decided the employment was in interstate commerce though exhibiting some struggle with opposing considerations.

They seemed to have been constrained to that conclusion by the same cases, and a review of them, therefore, is immediately indicated to see whether in their discord or harmony, whichever exists, a solution can be found for the present controversy.

They all dealt with considerations depend-

\*82

ent upon the \*distinctions of fact and law between interstate and intrastate commerce. A distinction, it may at once be said, is plain enough so far as the essential characteristics of the commerces are concerned, but how far instruments or personal actions are connected with either and can be assigned to either, becomes in cases a matter of difficulty, and ground, it may be, of divergent judgments. With this in mind we review the cases.

But first as to the facts in this. Defendant is an interstate railroad and upon its line running from other states to New York it operated in New York a signal tower and switches to attend which plaintiff was employed. It also had near the tower a pumping station, consisting of water tank, and a gasoline engine for pumping purposes through which instrumentalities water was supplied to its engines in whichever commerce engaged. While in attendance at the pumping station plaintiff was injured. And such is the case, that is, while in attendance at the pumping station, it being his duty to so attend, was he injured in interstate commerce?

It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signaled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping sta-



tion he put off an interstate character and took on one of intrastate quality or, it may be, was divested of both and sank into undesignated employment. A rather abrupt transition it would seem at first blush, and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within it at one point of time and without it at another—within it when on the signal tower, but without it when in the pump house, though in both places being concerned with trains engaged in interstate commerce.

\*83

\*But let us go from speculation to the cases. *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, D., L. & W. R. R. Co. v. *Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, *Shanks v. D., L. & W. R. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, and *Roush v. B. & O. R. R. Co.* (D. C.) 243 Fed. 712, were considered by the Court of Appeals. Some state cases were also referred to.

In *Pedersen v. D., L. & W. R. R. Co.* it was held that one carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, was entitled to invoke the Employers' Liability Act. In other words, that one employed upon an instrumentality of interstate commerce was employed in interstate commerce. And it was said, citing cases:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged."

In the *Yurkonis* Case the injury complained of happened to *Yurkonis* on a mine or colliery of the railroad by the explosion of gases when *Yurkonis* was engaged in and about the performance of his duties. It was held that an injury so received, though the coal was destined for use in interstate commerce, was not one occurring in such commerce.

In *Roush v. B. & O. R. R. Co.* (D. C.) 243 Fed. 712, the decision was that one employed in operating a pumping station which furnished water to interstate and intrastate roads was engaged in work incidental to interstate commerce, the court deducing that conclusion from cases from which it liberally quoted.

*C., B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the Court of Appeals considered as substantially the same in incident and principle with the *Yurkonis* Case, *supra*. The case concerned an

\*84

injury \*while handling coal. It was a step or steps nearer the instrumentality of use. It was being removed when the injury complained of occurred from storage tracks to chutes. The employment was considered too distant from interstate commerce to be a

part of it or to have "close or direct relation to interstate transportation." The *Yurkonis* Case was cited and applied.

*Shanks v. D., L. & W. R. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, was considered of like character. The employment asserted to have been in interstate commerce was the taking down and putting up fixtures in a machine shop for repairing interstate locomotives.

Before summarizing these cases we may add *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, and *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69. In the *Winters* Case the work was repairing an engine. The engine, it was said, had no definite destination. "It simply had finished some interstate business and had not as yet begun upon any other." As to such instrumentalities the determining principle was said to be that their character depends upon their "employment at the time, not upon remote probabilities or accidental later events."

In the *Puckett* Case an employé (car inspector) going to the relief of another employé stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the differences between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

\*85

[1, 2] \*In the *Pedersen* Case it was said that the questions which naturally arise: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" Or as said in *Shanks v. D., L. & W. R. R. Co.*, *supra*, was the "work so closely related to it [interstate commerce] as to be practically a part of it?" The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true but his duty there was performed and the instruments and facilities of it were kept in

readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied.

[3] There is only one other assertion of error that demands notice. The others (regarding assumption of risk and contributory negligence) counsel neither argue nor submit; their abandonment, therefore, may be assumed.

[4] It is asserted against the verdict that it is "outrageously excessive," caused by the instruction of the court that plaintiff could recover "for shame and humiliation." Counsel's argument is not easy to represent or estimate. They say that "mental pain" of the designated character, "the suffering from feelings, is intangible, incapable of test or trial," might vary in individuals, "rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal." If all that be granted, it was for the consideration of the jury. It certainly cannot be pronounced a proposition of law that personal mutilation or disfiguration may be a mat-

\*86

ter of indifference to any body \*or that sensitiveness to it may vary with "temperaments" and be incapable of measurement. We see no error in the instruction.

Judgment affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

(253 U. S. 193)

PIEDMONT POWER & LIGHT CO. v.  
TOWN OF GRAHAM et al.

PASCHALL et al. v. SAME.

(Submitted [on Motion to Dismiss or Affirm, or Transfer to Summary Docket] April 19, 1920. Decided May 17, 1920.)

Nos. 684, 685.

1. ELECTRICITY 4—FRANCHISE TO USE STREETS NOT EXCLUSIVE.

A grant of the right to use the streets of a town for the distribution of electric current was not rendered exclusive by a provision therein that the town thereby warranted that it would provide for the full and free use of its streets, lanes, etc.

2. FRANCHISES 3—STRICTLY CONSTRUED AND NOTHING PASSES BY IMPLICATION.

Grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocally granted is withheld; nothing passing by implication.

3. COURTS 385(7)—CONTENTION THAT FRANCHISE VIOLATES RIGHT OF HOLDER OF EARLIER FRANCHISE TOO FRIVOLOUS TO SUPPORT APPEAL.

The contention of the holder of a nonexclusive franchise to use the streets of a town for the distribution of electric power that a similar

grant to another violates its contract, and takes its property in violation of the federal Constitution, is too frivolous to support a direct appeal to the Supreme Court.

Appeals from the District Court of the United States for the Western District of North Carolina.

Two suits, by the Piedmont Power & Light Company and by J. R. Paschall and another, against the Town of Graham and others. From decrees dismissing the complaints, plaintiffs appeal. On motion to dismiss or affirm, or transfer to summary docket. Appeals dismissed.

Mr. James H. Bridgers, of Henderson, N. C., for appellants.

Messrs. Charles W. Tillett, of Charlotte, N. C., and William P. Bynum, of Greensboro, N. C., for appellees.

\*194

\*Memorandum opinion by direction of the Court by Mr. Justice CLARKE.

These are appeals direct from decrees of the District Court sustaining motions to dismiss complaints for the reason that they did not state facts sufficient to constitute a valid cause of action in equity. The cases involve the same facts differently stated by different complainants. The asserted warrant for the appeals in that action taken by the officials of the town of Graham, North Carolina, if allowed to become effective, would result in violation of appellants' contract with that town and in depriving them of their property without due process of law, in violation of the Constitution of the United States.

Since the bill in No. 684 contains all of the elements of strength which the bill in No. 685 contains and lacks some of its elements of weakness, the disposition of the former will rule the latter.

In No. 684 the appellant, a corporation, averring that it is the owner of a franchise to use the streets of the town of Graham for the distribution of electric current, prays that the officials of the town be restrained from certifying as lawfully passed an ordinance granting a like franchise to the defendant the Mutual Power & Light Company, and that the company be enjoined from using the streets for such purpose.

[1-3] The grant to the appellant is set out in full in the bill and plainly it is not one of exclusive rights in the streets. The attempt to derive an exclusive grant from the declaration, in the paragraph of the ordinance relating to the trimming of trees, that "said town of Graham hereby warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes," etc., is fatuous and futile. Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocally granted is withheld; nothing



\*195

passes \*by implication. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34, 26 Sup. Ct. 224, 50 L. Ed. 353; *Blair v. Chicago*, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801; *City of Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 396, 412, 38 Sup. Ct. 362, 62 L. Ed. 793. The grant to appellant not being an exclusive one, the contention that competition in business, likely to result from a similar grant to another company, would be a violation of appellant's contract, or a taking of its property in violation of the Constitution of the United States is so plainly frivolous that the motion to dismiss for want of jurisdiction, filed in each case, must be sustained. *David Kauffman Sons Co. v. Smith, Collector*, 216 U. S. 610, 30 Sup. Ct. 419, 54 L. Ed. 636; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 35 Sup. Ct. 739, 59 L. Ed. 1127; *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. 191, 63 L. Ed. 550.

Dismissed.

(253 U. S. 86)

### ERIE R. CO. v. SZARY.

(Argued Jan. 8, 1920. Decided May 17, 1920.)

No. 355.

COMMERCE §27(8)—PERSON DRYING SAND USED IN ENGINES HELD ENGAGED IN "INTERSTATE COMMERCE."

A railroad employé, engaged in drying sand for use in engines, some of which were engaged in interstate commerce, and dumping the ashes from the fires in an ash pit across a track from the sandhouse, and who, after emptying a pail of ashes, went for a drink of water, and was struck by an engine when returning for his pail, was engaged in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Mr. Justice Van Devanter and Mr. Justice Pitney dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by Antoni Szary against the Erie Railroad Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (259 Fed. 178, 170 C. C. A. 246), and defendant brings certiorari. Affirmed.

See also 250 U. S. 636, 39 Sup. Ct. 490, 63 L. Ed. 1183.

Messrs. Theodore Kiendl, Jr., of Brooklyn, and William C. Cannon, of New York City, for petitioner.

Mr. John C. Robinson, of New York City, for respondent.

\*88

\*Mr. Justice McKENNA delivered the opinion of the Court.

Action for damages under the Employers' Liability Act (Comp. St. §§ 8657-8665), for the loss of a leg in the railroad company's service. The verdict and judgment were for \$20,000. The contest in the case is whether the injury was received in interstate or intrastate service.

The judges below concurred in the judgment but disagreed upon the grounds of it. Judges Hand and Hough concurred on the authority of the *Collins Case*, 259 Fed. 172, 170 C. C. A. 240, though Judge Hand did not sit in it, and Judge Hough dissented from its judgment.

As we have just affirmed that case, if it is not distinguishable from the case at bar, the latter must also be affirmed. A distinction is not asserted, but both cases are attacked. In our opinion in the *Collins Case* we have reviewed most of the cases upon which the company relies in this, and whether their principle applies depends upon the facts. We collect them from the testimony and represent them as the jury had a right to consider them, omitting conflicts.

\*89

\*Sand is necessary to an engine and must be used dry. Szary and two others were employed in its preparation, which was done in what is called the "sand house," a small structure standing in the yards of the company alongside of the tracks. The drying was done in four large stoves which it was the duty of Szary and his associates to attend. Soft coal was the heating means and the resulting ashes were dumped in an ash pit, to do which a track had to be crossed.

On the night of the accident, January 5, 1917, Szary began his duties at 6 o'clock, and sanded about seven engines whose destinations were other states. He sanded the last engine at 9 o'clock, and after doing so, he removed the ashes from the stove and carried them to the ash pit in a pail according to his custom, in doing which he was compelled to cross one of the tracks. He emptied the pail and left it on the ground while he went to the engine room to get a drink of water, and when returning for the pail and crossing the track he was hit by an engine. He had looked and saw no engine and heard no signal. He described the night as "very dark and very foggy and rainy and misty," and testified that he could not see anything, the steam and smoke from the engines in all parts of the yard being so thick that he could see nothing.

The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital and his left leg was amputated the same night from two to three inches below the knee.

We think these facts bring the case within the *Collins Case* and the test there deduced from prior decisions. There were at-

tempts there, and there are attempts here, to separate the duty and assign its character by intervals of time, and distinctions between the acts of service. Indeed something is attempted to be made of an omission, or an asserted omission, in the evidence, of the kind of commerce in which the

\*90

last engine served was engaged. \*The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character.

The conclusion that the service of Szary was rendered in interstate commerce determines the correctness of the ruling of the District Court upon the motion to dismiss made at the close of plaintiff's evidence, and afterwards for particular instructions and the objections to the charge by the court. All of the rulings were based on the character of the commerce, the court adjudging it to be interstate.

It hence follows that the judgment must be and it is

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

(253 U. S. 187)

E. W. BLISS CO. v. UNITED STATES.

(Argued March 12 and 15, 1920. Decided May 17, 1920.)

No. 240.

1. COURTS ~~443~~463—PETITION GIVING JURISDICTION TO COURT OF CLAIMS HELD NOT TO SHOW CONTRACT.

A petition in the Court of Claims, alleging that the petitioner had an exclusive license to use a patented superheater in a specified make of torpedoes sold only to the United States government; that on request it granted the government permission to purchase torpedoes containing such invention from another company, the amount of royalty to be settled later; that torpedoes so equipped were purchased by the United States, but no royalty was ever paid; that it demanded \$500 for each superheater, which the government refused to pay; and that it never granted any reduction, or consented to the use of the invention without payment of such royalty—did not show a contract, express or implied, to pay a royalty in any amount, but negatived the making of a contract necessary to give jurisdiction to the Court of Claims under Judicial Code, § 145 (Comp. St. § 1136).

2. COURTS ~~449~~(3)—"OWNER," TO BE ENTITLED TO SUE FOR PATENT INFRINGEMENT IN COURT OF CLAIMS, MUST BE ENTITLED TO SUE OTHER INFRINGERS.

Under Act June 25, 1910 (Comp. St. § 9465), authorizing the owner of a patent infringed by the United States to recover reasonable compensation in the Court of Claims, and

reserving to the government all defenses which might be pleaded by another defendant, the "owner," who may maintain an infringement suit against the government, must have such interest in the patent as would support such suit against another defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

3. COURTS ~~449~~(3)—CONTRACT GRANTING EXCLUSIVE RIGHT TO USE PATENT HELD A LICENSE, NOT AUTHORIZING HOLDER TO SUE FOR INFRINGEMENT.

A contract granting the petitioner a "sole and exclusive license" to use a patented superheater for propelling certain torpedoes wherever sold, and "Whitehead torpedoes sold only to the United States government," binding the petitioner to pay a royalty for each torpedo fitted with the device, and not purporting to grant an interest in the patent, or any exclusive territorial rights, and requiring the licensor to defend the license thereby granted against infringers, was a mere license, which did not authorize the licensee to sue the United States for infringement.

Appeal from the Court of Claims.

Suit by the E. W. Bliss Company against the United States. From a judgment dismissing the suit (53 Ct. Cl. 47, 641), petitioner appeals. Affirmed.

Mr. Arthur C. Fraser, of New York City, for appellant.

Messrs. Assistant Attorney General Davis and Daniel L. Morris, of Washington, D. C., for the United States.

\*188

\*Mr. Justice CLARKE delivered the opinion of the Court.

In this suit compensation is sought from the government for the use which it made of a patented "superheater," in connection with Whitehead torpedoes.

A "superheater" is a device in which fuel is burned in the compressed air which drives the motor by which a torpedo is propelled through the water, so that the air is heated to such a degree that its energy is greatly increased, with the result that the range of the use of the torpedo is much extended.

The Court of Claims interpreted the petition as containing a claim that the defendant had contracted to pay appellant for 50 "superheaters" at \$500 each, and also as claiming that it had infringed rights of the appellant in certain United States patents by the purchase of 360 "superheaters" from Whitehead & Co., a British corporation, and by itself manufacturing 100 such "superheaters." Concluding, as to the first claim, that the petition did not state a cause of action in contract, and, as to the second, that it did not show title to the patents involved sufficient to support infringement, a demurrer to the petition was sustained, and the suit dismissed.



The main contention in this court is that a cause of action in contract is stated with respect to all of the 510 "superheaters," but in the alternative, though faintly, it is claimed that the allegations also make out a case of infringement.

The appellant alleges that it was the owner of two United States patents issued in 1902, covering the "superheater" device, and that in 1905 it entered into a written contract with the Armstrong Company, a British corporation, for the use of improvements in "superheaters" owned by that company and

\*189

at the time protected in Great Britain by a provisional specification for a patent. A copy of this contract, attached to the petition, after reciting that the Armstrong Company proposes to apply for a patent in the United States upon the improvements in "superheaters" which it owns, and that it is desirous of granting to the appellant the exclusive license to use such invention "in connection with the Bliss-Leavitt torpedo" manufactured by appellant, proceeds to grant to appellant the "sole and exclusive license" to use such inventions for the full term of the letters patent thereafter to be procured for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company and "Whitehead torpedoes sold only to the United States government."

The contract provides for the payment by the appellant of a royalty of \$25 for each torpedo fitted with the Armstrong inventions under penalty of cancellation, and that the Armstrong Company shall pay all costs and expenses of procuring the contemplated patents and of protecting them against infringement.

The petition alleges that eight United States patents on the "superheater" device were procured by the Armstrong Company, variously dated from August 7, 1906, to November 14, 1911, but no assignment of rights under them was made to appellant other than such as it derives from the contract of 1905, which, it avers, has been fully recognized and its terms complied with, by both of the parties to it.

The references in the amended petition to the two patents owned by the appellant are so meager and so vague that we conclude that liability in contract or for infringement must be derived, if at all, from the allegations applicable to the contract of 1905.

As to the contract:

[1] The allegations are that prior to 1907 Armstrong & Co. licensed Whitehead & Co., a

\*190

British corporation, to "use and exercise" its superheater inventions patented in Great Britain and in the United States, but subject to the rights of appellant under its contract of 1905; that in June, 1907, the appellant granted a request by the defendant for permission to purchase from Whitehead & Co. not more than 100 torpedoes containing the

"superheater" invention, the amount of royalty "to be later settled"; that subsequently 50 torpedoes so equipped were purchased and were brought into the United States subsequent to June 1, 1908; but that no royalty was ever paid to appellant for the use of the "superheaters" upon them.

If the petition had stopped here, there might be substance in the claim that as to these 50 torpedoes a contract for royalty on the basis of quantum meruit should be implied. But the petition goes on and alleges that in November, 1907, before the alleged purchase of the 50 torpedoes, in a treaty between the parties as to the amount of royalty to be paid, a demand by the petitioner of \$500 for each "superheater" installed in a Whitehead torpedo was refused by the government; that in December, 1910, and again in March, 1912, long after the alleged purchase, the prior discussion as to royalty was renewed, but without agreement; and finally it is averred—

"that petitioner, by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented invention or of said patented improvements thereon or any of them by defendant without payment of said royalty of \$500 each."

It is too clear for discussion that these allegations, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but that they distinctly and in terms negative the making of any such contract as is necessary to give the Court of Claims jurisdic-

\*191

tion under the applicable section of the \*Judicial Code (section 145 [Comp. St. § 1136]) and the decisions of this court. *Schillinger v. United States*, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; *United States v. Berdan Firearms Manufacturing Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530; *Russell v. United States*, 182 U. S. 516, 21 Sup. Ct. 899, 45 L. Ed. 1210; *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519; *Harley v. United States*, 198 U. S. 229, 304, 25 Sup. Ct. 634, 49 L. Ed. 1029; *Juragua Iron Co., Ltd., v. United States*, 212 U. S. 297, 309, 29 Sup. Ct. 385, 53 L. Ed. 520; *Farnham v. United States*, 240 U. S. 537, 540, 36 Sup. Ct. 427, 60 L. Ed. 786.

Treating for peace with one claiming patent rights for which it paid a royalty of \$25 falls far short of a "convention between the parties—a coming together of the minds"—to pay \$500, or any other amount, for the use of the device.

As to the claim for infringement:

The contract of 1905, relied upon, in terms granted to the appellant the "sole and exclusive license" to use the Armstrong inventions for the terms of the patents thereafter to be procured in Great Britain and in the United States "for the purpose of propelling Bliss-

Leavitt torpedoes" (with which we are not concerned) "wherever sold by the Bliss Company and the Whitehead torpedoes sold only to the United States government."

[2] Authority to maintain a suit for infringement against the United States can be derived only from the Act of Congress of June 25, 1910 (36 Stat. 851, c. 423 [Comp. St. § 9465]), which provides that the "owner" of an infringed patent may recover reasonable compensation in the Court of Claims, and reserves to the United States "all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in title LX of the Revised Statutes of the United States, or otherwise."

Giving to this statute, as we do, the liberal interpretation placed upon it in *Crozier v. Krupp*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771, and in *Cramp v. International Curtis Marine Turbine Co.*, 246 U. S. 28, 38 Sup. Ct. 271, 62 L. Ed. 560, the "owner" who may maintain an infringement suit against the government must have at least such an in-

\*192

terest in the patent as without the \*statute would support such a suit against a defendant other than the United States.

[3] It has long been settled that a licensee may not maintain a suit for infringement (*Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Paper Bag Cases*, 105 U. S. 766, 26 L. Ed. 959; *Pope Manufacturing Co. v. Gormully & Jeffery Manufacturing Co.*, 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423), and that to entitle an assignee or grantee to maintain such a suit under warrant of R. S. § 4919 (Comp. St. § 9464), such assignee or grantee must have an assignment, grant, or conveyance, either of the whole patent, of an undivided part of it, or of an exclusive right under it "within and throughout a specified part of the United States." Any assignment or transfer short of one of these is a mere license, giving the licensee no interest in the patent sufficient to sue at law in his own name for infringement or in equity without joining the owner of the patent. *Waterman v. Mackenzie*, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923; *Pope Manufacturing Co. v. Gormully & Jeffery Manufacturing Co.*, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. Ed. 414.

While the legal effect of the terms used, and not the name applied to the instrument containing them, will determine whether a transfer is an assignment or a license, nevertheless the language used is often, as in this case, of great significance in determining what that legal effect shall be.

The right granted the appellant by the contract of 1905 is termed in it a "license"; the appellant contracts, as licensees usually do, to pay a royalty for each torpedo fitted with the devices to be patented; the contract does

not purport to grant an interest in the patent or any exclusive territorial rights, but only, with respect to the Whitehead torpedo, rights as to a single prospective purchaser, the government of the United States; and the Armstrong Company contracts at its own cost "to take all necessary proceedings for protecting and defending the license to use \* \* \*

\*193

hereby granted" against \*infringers. Palpably this is a mere license, not sufficient to sustain a suit for infringement.

Several minor questions, including some of practice, are argued in the brief for appellant, but the opinion of the Court of Claims deals with them thoroughly and satisfactorily and its judgment is

Affirmed.

=====

(253 U. S. 71)  
GREAT NORTHERN RY. CO. v. CAHILL  
et al.

(Argued Jan. 13, 1920. Decided May 17, 1920.)

No. 124.

CONSTITUTIONAL LAW — 297 — RAILROADS —  
225 — COMPELLING RAILROAD COMPANY TO INSTALL CATTLE SCALES FOR BENEFIT OF DEALERS DENIES DUE PROCESS.

A state cannot compel a railroad company to install cattle scales at a station as a means for building up the business of trading in cattle at that point, however much the public might be benefited thereby.

In Error to the Supreme Court of the State of South Dakota.

Proceeding instituted before the Board of Railroad Commissioners of South Dakota by J. C. Cahill and another, copartners as Redman & Cahill, against the Great Northern Railroad Company. A judgment reversing the order of the Board was reversed, and the order of the Board affirmed, by the Supreme Court of South Dakota (40 S. D. 55, 166 N. W. 306), and the Railroad Company brings error. Reversed and remanded, with directions.

Messrs. E. C. Lindley and M. L. Countryman, both of St. Paul, Minn., for plaintiff in error.

Messrs. Oliver E. Sweet, of Pierre, S. D., Clarence C. Caldwell, of Sioux Falls, S. D., and P. W. Dougherty, of Pierre, S. D., for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In *Great Northern Railway Co. v. Minnesota*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337, the question was whether an order of the Railroad and Warehouse Commission of Minnesota directing the railway to install at a named station a cattle-weighing scale was rightly sustained by the Supreme



\*72

Court of the state. It was found by that court (a) that out of 259 stations on the railway line in Minnesota where stockyards for handling cattle existed there were but 54 supplied with cattle-weighing scales, all of which the railway had voluntarily installed; (b) that although such scales had no direct part in transportation, they were convenient in stock dealings, and a station possessing one had an advantage over a place where none existed; in fact, that at the 54 stations where they had been voluntarily installed it had come to pass that they were used, not by shippers for the purposes of their transportation business, but by those who bought and sold cattle.

Coming to consider the contention of the railway that the order to put in the scales was repugnant to the Fourteenth Amendment as a taking of its property without due process, since as a carrier no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that as the duty of the railway was confined to furnishing appliances for its business of transportation and that cattle scales were not of such a character it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle however much the public might be benefited thereby, the defense of the railway was maintained and the order of the Commission was held to be wanting in due process and void. The result it was pointed out could not be avoided by the suggestion that the order was intended to correct a discrimination which existed in favor of certain stations which had scales, since in substance to say that would be to correct one discrimination by creating another.

Shortly before the argument in this court of the Minnesota case just referred to, the firm

\*73

of Cahill & Redman petitioned the Board of Railroad Commissioners of South Dakota for an order requiring the Great Northern Railway Company to install and maintain a cattle scale adjacent to its cattle yards at Albee station. It was alleged in the petition that no means otherwise of weighing cattle existed at Albee, that the public necessities of the cattle trade required the scale, and that the number of cattle shipped from the place justified the outlay by the railway.

The railway answered, denying any duty on its part to install the scale, and asserted that to compel it to put the scale in would deprive it of its property without due process, and would besides deny it the equal protection of the laws, both in violation of the Fourteenth Amendment.

At the hearing which followed there was no showing that any cattle had been shipped

over the railway into Albee. It was indisputably established, however: (a) That not only the defendant railway but the other roads operating in the state of South Dakota had at some of their stations installed stock yard scales which presumably, in the absence of all proof to the contrary, had been voluntarily installed; (b) that all shipments of cattle from Albee during the preceding three years amounted only to 56 carloads, all of which were moved in interstate commerce, that is, to St. Paul, Minn., and that with regard to less than carload lots two cattle shipped in intrastate commerce constituted the sole movement; (c) that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purposes of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery; (d) that the business of dealing in cattle at Albee would be facilitated and probably increased by the existence there of a cattle scale where cattle dealt in could be weighed, and that the public want in this respect had come to be increasingly felt since the removal by its owner of

\*74

a private scale which the public had used at a time previous to the demand made upon the railway to install the cattle scale here in question.

The Commission in its findings, while pointing out that the complainants had testified that, besides the benefit to the public, there would be an advantage to shippers by the establishment of the scale, as it would enable the shippers to load their cattle, so as to avoid any loss resulting from a failure to bring the loaded car up to the minimum weight required for carload shipments, added the following:

"The testimony of the other witnesses, including those appearing for the railway company, is to the effect that the only use to which a stock scale is put is for the accommodation and convenience of stock buyers and persons making sales of live stock to the buyers at stockyards in arriving at the weights as to the basis for the purchase and sale."

In the meanwhile the Minnesota case had been decided and therefore when the Commission came to apply the law to the facts by it found in this case it was called upon to determine how far the ruling in that case deprived it of power to grant the relief prayed in this. Discharging that duty, it held that the Minnesota case was inapplicable, because in South Dakota there was a common knowledge that railroad cattle scales when established were for the benefit of both the public and shippers, enabling all who took cattle into the railroad yards whether for shipment or otherwise to ascertain their weight. After referring to the relation in certain aspects which cattle scales, when installed, bore

to carload and less than carload shipments, and that a law of the state provided for the inspection of cattle scales when installed by railways at their cattle yards, it was pointed out that, in accordance with many adjudged cases establishing that it was a part of the duty of a carrier to install stockyards in which to hold cattle intended for shipment and to receive inbound cattle when unloaded, it had by further legislation been

\*75

made the duty of carriers \*to establish stockyards at their stations. Declaring that no difference in principle existed between the duty to furnish stockyards and the duty to install stock scales, the conclusion of the Commission was thus summed up:

"After a very careful examination of the evidence in this record, this commission is of the opinion and finds that live stock scales are a necessary facility at stockyards for the weighing of live stock received for the purposes of shipment, not only for the convenience of the public at large, live stock buyers and individual shippers, but in the necessary weighing preliminary to properly loading and subsequent to the unloading of live stock at such stockyards, and that there is an actual public necessity for the installation of a stockyards scale at the stockyards of the defendant at its station at Albee, in Grant county, in this state."

Conforming to these conclusions, the order awarded directed the installation of a stock scale of a certain capacity "in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee."

An intermediary court to which the case was removed held that as the furnishing of a stock scale was no part of the duty of a common carrier, the railway could not be compelled to furnish it without taking its property without due process of law, and that this result would be all the more flagrantly brought about by compelling the railway to furnish the scale upon the theory that if furnished it would afford a facility for the trading in cattle at the place where it was installed.

The complainant and the Board of Railroad and Warehouse Commissioners, as appellants, in invoking the reversal of the judgment of the intermediary court and the affirmation of the order of the Board, as stated by the Supreme Court of the state, in that

\*76

court relied solely upon \*two grounds:

"First, that local buyers and sellers of live stock have the right to demand the installation of stockyard scales for their own convenience in buying live stock; and, second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum

loads, and to ascertain the cost of shipping stock in the car in excess of the minimum carload weight."

Disposing of the first of these contentions the court said:

"The fallacy of the first proposition is so clear that discussion would be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment."

In passing upon the second proposition the court quoted a passage from a text-book (10 Corpus Juris, 59), in which, after stating the general duty of a common carrier to furnish appliances necessary or appropriate for discharging its duties as a common carrier, it was declared:

"The duty of a carrier of live stock it is said cannot be efficiently discharged without the aid of pens or yards in which the live stock offered for shipment can be received and handled with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported and such duty is strictly analogous to the duty of the carrier to construct and maintain a secure depot for inanimate freight."

Applying such doctrine the court, without citation of authority or reference to any legislative enactment or administrative practice supporting the view, and without referring to the South Dakota statutes relied upon by the Board, making it obligatory upon the carrier to put in cattle pens at all stations, without imposing any such duty to put in cattle scales, but, on the contrary, giving power only to inspect such scales when put in, held, wholly as a matter of first impression, that the identity between the two (cattle yards and cattle scales) was so complete

\*77

that \*the obligation which existed to erect cattle yards at every station also established the duty to install cattle scales at every station. The judgment of the intermediary court was therefore reversed and the order of the Board affirmed.

Eliminating, as this conclusion did, all the questions pressed before the Board obviously with the purpose of taking the case out of the reach of the Minnesota decision, based upon a supposed duty to put in scales because of the advantage which would result to dealers in cattle, it clearly follows that this case is decisively controlled by the ruling in the Minnesota case, and therefore leaves us only the duty to apply that ruling. Coming to do so, the judgment below is therefore reversed and the cause remanded with directions for further proceedings not inconsistent with this opinion.

It is so ordered.



(253 U. S. 101)

WESTERN UNION TELEGRAPH CO. v.  
BROWN et al.(Argued Jan. 20 and 21, 1920. Decided May 17,  
1920.)

No. 159.

1. SALES ◊4(4)—NATURE OF "OPTION"  
STATED.

An "option" is a privilege given by the owner of property to another to buy the property at his election, and the owner does not sell the property, but gives to another the right to buy at his election.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Option.]

2. CORPORATIONS ◊116—CONTRACT HELD A  
SALE OF STOCK, AND NOT AN OPTION TER-  
MINABLE AT WILL.

A contract whereby the owners of stock agreed to sell, and the other parties agreed to buy, the stock for a price payable in installments, and which provided that the stock should be deposited in escrow until final payment, and that in case of default the stock might be returned to the sellers, and all payments theretofore made should be forfeited to them, and the rights of each of the parties should cease and terminate, was a sale, and not an option terminable by the purchasers at will, as the provision for termination of the contract was for the benefit of the sellers, and hence the measure of damages for delay in delivery of a telegram stopping payment of a draft sent as a payment on the contract was not the amount of the draft.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by George M. Brown, executor of William Lange, Jr., deceased, and another, against the Western Union Telegraph Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (248 Fed. 656, 160 C. C. A. 556), and defendants bring certiorari. Reversed and remanded.

See, also, 248 U. S. 552, 39 Sup. Ct. 8, 63 L. Ed. 418.

\*102

\*Messrs. Beverly L. Hodghead, of San Francisco, Cal., and Rush Taggart and Francis Raymond Stark, both of New York City, for petitioner.

Mr. Samuel Poorman, Jr., of Los Angeles, Cal., for respondents.

\*103

\*Mr. Justice DAY delivered the opinion of the Court.

This is an action by Brown, executor of Lange, and Hastings to recover damages from

\*104

the Western Union Telegraph Company for failure to deliver a message sent by Hastings and Lange to the Lyon County Bank, Yerington, Nev. A judgment was recovered against the telegraph company in the District Court, which was affirmed in the Circuit Court of Appeals for the Ninth Circuit. 248 Fed. 656,

160 C. C. A. 556. The case is here upon writ of certiorari.

Upon stipulation the case was tried in the District Court without a jury, and the court made findings from which it appears: On March 16, 1907, W. C. Pitt and W. T. Campbell entered into a contract with Hastings and Lange for the sale of 625,000 shares of the capital stock of the Kennedy Consolidated Gold Mining Company. In this contract it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take, and receive from them, 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First. The total price to be paid for the shares of stock to be \$75,000 in gold coin of the United States payable \$7,500 on the execution of the agreement; \$11,250 on or before the 1st day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon payment of the first-named sum Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nev., certificates of stock indorsed in blank representing in the aggregate 625,000 shares of the capital stock of the mining company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments

\*105

\*under the agreement, and it was further agreed that in event of default by Hastings and Lange the bank should be authorized, under the terms of such deposit in escrow, to deliver all the shares of stock so deposited with it to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate. Hastings and Lange paid to Pitt and Campbell the initial sum of \$7,500, and Pitt and Campbell deposited in escrow with the Lyon County Bank certificates of stock representing 625,000 shares of the stock of the mining company properly indorsed, and the bank received said certificates in escrow and held the same in accordance with the contract. After the execution of the contract Hastings and Lange arranged with the bank to treat drafts that they might send it in partial payment as gold coin, and to pay the amount of such drafts in gold coin to Pitt and Campbell under said contract; that for the purpose of making the payment mentioned in the contract which became due on or before May 1, 1907, Hastings and Lange on April 27, 1907,

sent by mail from Oakland, Cal., to the Lyon County Bank, at Yerington, Nev., a draft for the sum of \$11,250 United States gold coin, payable to the order of the bank; that the draft was received by the bank at Yerington, Nev., on April 30, 1907, some time between 8:30 a. m., the time the bank opened for business, and 9 o'clock a. m. of that day; that on April 29, 1907, before the message herein-after mentioned was delivered to the telegraph company, Hastings and Lange were informed and believed that the stock of the mining company was of little or no value, and upon obtaining such information they determined to make no further payments on their contract with Pitt and Campbell, and to abandon their rights in and to said stock, and to withdraw from the transaction with

\*106

Pitt and Campbell. It is further found \*that on the evening of April 29, 1907, plaintiffs called at the office of the defendant in Oakland, Cal., and requested the agent in charge to telegraph the Lyon County Bank at Yerington, Nev., as follows:

"Oakland, April 29, 1907.

"Lyon County Bank, Yerington, Nevada.

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt and Campbell. Return draft. Letter follows.

"Hastings and Lange."

Hastings and Lange stated to the agent of the telegraph company that it was necessary that the message be delivered to the bank before banking hours on the following morning, that is, before it opened for business on the 30th day of April, 1907, and desired to know of the agent in what manner they could be absolutely assured that the message would be so delivered, stating to the agent that they had a contract for the purchase of certain shares of stock of a mining company, and that payment under the contract was required to be made by them on or before May 1, 1907, to Pitt and Campbell through the bank, and that in default thereof the contract to purchase the stock would by its terms be forfeited, and the rights of the parties thereto would cease and terminate; that for the purpose of making the payment they had mailed to the bank a certain bank draft in the sum of \$11,250; that in the ordinary course of the mail between the city of Oakland, Cal., and the town of Yerington, Nev., the same would be delivered to the bank on the following morning, that is to say, during the forenoon of April 30, 1907; that since mailing the draft they had learned facts touching the value of the stock which had determined them to make no further payments and to forfeit the contract and all money by them paid thereunder; that they were seek-

\*107

ing \*by the message to intercept payment by the bank on account of the contract through said Pitt and Campbell; and that unless such message were transmitted, and delivered immediately to the bank before banking hours

on April 30, 1907, it would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event the amount would be wholly lost to them, as they did not intend to continue under their contract, having learned that the stock was of little or no value. It was further found that thereupon the agent represented that the telegraph company would insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay the sum of \$1.45, which sum was in excess of the company's regular charge. Plaintiff accepted the proposal, and paid the sum to the agent. In the presence of the plaintiffs the agent thereupon wrote upon the message, immediately below the date thereof, the words, "Deliver immediately," and accepted the message for immediate transmission to the town of Yerington for immediate delivery to the bank and agreed to immediately transmit and immediately deliver it to the bank for the plaintiffs, and assured the plaintiffs of such immediate transmission and immediate delivery thereof. The sum of \$1.45 was in excess of the defendant's regular charge and usual toll; the usual charge for an unrepeatd message being 98 cents, and for a repeated message the sum of \$1.47. The message was written upon a blank form of the telegraph company, which is set forth in the findings.

It is further found that neither Hastings nor Lange read the printed matter on the blank, nor was either of them cognizant of the terms and conditions written thereon; the message was not repeated in the manner provided in the stipulations on the blank; that the regular course of communication by telegraph between Oakland, Cal., and Yerington, Nev., was by the lines of the Western Union Telegraph Company to Wabuska, Nev.,

\*108

which \*was the terminus of the telegraph company's lines for Yerington messages, and that in order to transmit telegrams beyond Wabuska it was necessary that they be transmitted from that point over the telephone line of the electric company to Yerington; that each of the companies received all messages offered it by the other company for further transmission, subject to the stipulations on telegraphic blanks, each company having and charging their separate toll; that the offices of the electric company and the telegraph company were both maintained in the Southern Pacific Railway Company station at Wabuska, and that the telephone instrument of the electric company was within a few feet of the telegraphic instruments of the telegraph company; that at the time the Southern Pacific Railroad Company employed an agent at Wabuska to attend to its railway business, and that by an arrangement between the railroad company and the telegraph company said agent was employed to attend to the telegraph business of the telegraph company at Wabuska; that by agreement between the railroad company and the



electric company the agent of the railroad company was at the same time employed by the electric company to handle the telephone business of the electric company; that there was a regular stage line open between Yerington and Wabuska in April and May, 1907; that the distance between Yerington and Wabuska was approximately 11 miles, and could be traversed in the stage in about 1½ hours.

It is found that the telegraph company did not promptly, upon the receipt of the message on the evening of April 29, 1907, transmit it to the town of Wabuska, Nev.; that the defendant did not promptly deliver the message to the electric company for further transmission over its telephone line to Wabuska, Nev., but, on the contrary, defendant wholly failed

\*109

and neglected \*to transmit the message to Wabuska until May 2, 1907, and wholly failed and neglected to deliver it to the electric company until May 2, 1907; that the delay in the transmission of the message occurred wholly on the lines of the telegraph company, and was caused by that company, and did not occur on the lines of the telephone of the Yerington Electric Company.

It is further found that, if the telegraph company had proceeded with reasonable promptness to transmit and deliver the message to the bank, the same would have reached Yerington before the bank had received the draft mailed to it as aforesaid, and it would not have placed the amount represented thereby to the credit of Pitt and Campbell, or either of them, or paid any amount thereon; that by reason of the gross negligence of the telegraph company the message was not delivered to the bank until May 2, 1907, between the hours of 8:30 and 9 a. m.; that the bank had received the draft, and thereafter, on April 30, had paid over the amount thereof in gold coin to Pitt and Campbell pursuant to the terms of the contract between the plaintiffs and Pitt and Campbell on account of the payment to be made on or before May 1, 1907, and had given credit to Hastings and Lange for the amount of said payment, all of which was done without any knowledge of said message or the determination of Hastings and Lange to recall said draft; that Hastings and Lange did not make any further payments on the purchase price of said shares of stock, but abandoned the contract with Pitt and Campbell and forfeited and lost all moneys paid thereon.

It was found that the 625,000 shares of stock of the Kennedy Consolidated Gold Mining Company have been at all times, and since and including April 29, 1907, practically valueless.

The Circuit Court of Appeals held: (1) That the contract was an option terminable

\*110

by the buyers' failure to \*make the payments required; (2) the oral agreement for the transmission of the message was a binding

agreement upon the Western Union Telegraph Company; (3) that under the circumstances the telegraph company was guilty of gross negligence in failing to transmit and deliver the message. The court thereupon affirmed the judgment of the District Court for the amount of the payment, adding interest.

[1] In our view of the case it is unnecessary to consider the correctness of the decision of the Circuit Court of Appeals as to the binding obligation of the oral contract made with the agent of the telegraph company, or the question of negligence of the company in the transmission and delivery of the message. The right of Hastings and Lange to recover was based upon the theory that the contract was an option terminable by the act of the buyer in failing to make the payment on the contract, which payment, it is found, would not have been made had the message been promptly delivered. An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.

[2] What, then, is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made, the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and in event of default in payment the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase, terminable at the will of the purchaser upon

\*111

failure \*to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement which put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

In our opinion *Stewart v. Griffith*, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. Ed. 782, 19 Ann.

Cas. 639, is controlling upon this point. In that case there was a sale of land, and the purchaser by the terms of the agreement paid \$500 as part of the purchase price. It was provided that in case of nonpayment of the balance of the first half of the purchase price on November 7, 1907, the \$500 paid on the contract was to be forfeited, and the contract of sale and conveyance was to be null and void and of no effect. The contention was that the defendant was free to withdraw from the contract if he chose to lose the \$500. But this court held, after considering the terms of the contract, that the \$500 was part of the purchase price to be paid; that the land was described as being sold; and that in view of such stipulations, the purchaser had bound himself to take the land. As to the provision for the forfeiture of the \$500, and the stipulation that the contract should become null and void upon nonpayment of the remainder of the purchase price, this court said:

"The condition plainly is for the benefit of

\*112

\*the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election and the condition may be insisted upon or waived at his choice. *Insurance Co. v. Norton*, 96 U. S. 234; *Oakes v. Manufacturers' Insurance Co.*, 135 Mass. 248, 249; *Titus v. Glen Falls Insurance Co.*, 81 N. Y. 410, 419."

The condition in the contract in *Stewart v. Griffith* that nonpayment should render the contract null and void is the equivalent of the stipulation in the present agreement, much relied upon by the respondent, that upon nonpayment of the stipulated sums the rights of each of said parties should cease and determine. We think the attempted distinction between *Stewart v. Griffith* and the instant case is untenable.

The Circuit Court of Appeals reinforced its conclusion that the contract was an option by stating that it was usual to sell mining property under privileges of purchase, and, when investigation showed that the property was not valuable, to terminate such options by forfeiting the sums paid therefor, and declining to make future payments. It is true that undeveloped mining property is often sold under option agreements. See 3 *Lindley on Mines*, § 859. But there is nothing to show that this contract was dependent upon the development of the mining property. The written agreement contains a positive undertaking to sell, upon the one part, and, upon the other part, to buy shares of the mining stock. Whether the shares sold constituted all the shares of the company does not appear. Nor is the relative proportion of those sold to the whole amount of the stock anywhere shown. The fact that the contract con-

tains a privilege of ending it at the election of the vendor for nonpayment of the sum stipulated does not convert it into an option

\*113

terminable by the purchasers at their will. *Stewart v. Griffith*, supra.

As the recovery of the amount paid, with interest, as adjudged in the Circuit Court of Appeals, is founded upon its conclusion that the contract was an option, and the damages the amount paid and forfeited by the failure to stop the payment of the draft, and as we are not able to accept that view of the contract, it follows that the judgment of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

Reversed.

(253 U. S. 136)

MECCANO, Limited, v. JOHN WANAMAKER, NEW YORK.

(Argued Jan. 26 and 27, 1920. Decided May 17, 1920.)

No. 187.

1. COURTS ⇨383(1)—JUDGMENT REVERSING ORDER GRANTING TEMPORARY INJUNCTION REVIEWABLE BY CERTIORARI.

Under Judicial Code, § 128 (Comp. St. § 1120), making the judgment of the Circuit Court of Appeals final in certain cases, and section 240 (Comp. St. § 1217), authorizing the Supreme Court to review by certiorari any case in which the judgment or decree of the Circuit Court of Appeals is made final, a judgment reversing an order granting a preliminary injunction in a suit for infringement of a patent and copyrights and for unfair competition may be brought up by certiorari and treated as if before the court on appeal.

2. APPEAL AND ERROR ⇨863, 1175(3)—ON APPEAL FROM ORDER GRANTING TEMPORARY INJUNCTION, CIRCUIT COURT OF APPEALS MAY DISMISS BILL.

On an appeal to the Circuit Court of Appeals, under Judicial Code, § 129 (Comp. St. § 1121), from an order granting a preliminary injunction, the court is not limited to a consideration of the order appealed from, but may dismiss the bill and terminate the litigation, if an insuperable objection to maintaining the bill clearly appears.

3. INJUNCTION ⇨135—GRANT OF PRELIMINARY INJUNCTION DISCRETIONARY.

Whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court.

4. APPEAL AND ERROR ⇨954(1)—GRANT OR DENIAL OF INJUNCTION NOT DISTURBED, UNLESS INEQUITABLE OR AN ABUSE OF DISCRETION.

An order granting or denying a preliminary injunction will not be disturbed on appeal, unless contrary to some rule of equity or the result of an improvident exercise of judicial discretion.



**5. APPEAL AND ERROR** ⚡1092—SUPREME COURT WILL NOT DISTURB ACTION ON PRELIMINARY INJUNCTION, EXCEPT FOR STRONG REASONS.

Except for strong reasons, the Supreme Court will not interfere with the action of the Circuit Court of Appeals on appeal from an order granting a preliminary injunction.

**6. APPEAL AND ERROR** ⚡1108—REVERSAL OF DECREE RELIED ON BY LOWER COURT PROPERLY NOTICED ON APPEAL.

Where a preliminary injunction in a suit for infringement of a patent and copyrights and unfair competition was evidently granted in reliance on a decree rendered in another suit brought by plaintiff against the party whose goods defendant was handling, the Circuit Court of Appeals properly took notice of the subsequent reversal of such decree.

**7. APPEAL AND ERROR** ⚡891—FINAL DECREE FOR PLAINTIFF CANNOT BE GRANTED ON APPEAL FROM ORDER GRANTING INJUNCTION, ON EX PARTE AFFIDAVITS.

While, on an appeal from an order granting a preliminary injunction, in a suit for infringement of a patent and copyrights and for unfair competition, the cause might be dismissed, if it clearly appeared that no ground existed for equitable relief, the court could not render a final decree for complainant on ex parte affidavits and decrees of other courts in a suit by the same plaintiff against the party whose goods defendant was charged with selling.

**8. APPEAL AND ERROR** ⚡863—SUPREME COURT CANNOT DETERMINE MERITS ON REVIEW OF PRELIMINARY INJUNCTION.

On review of a judgment reversing an order granting a preliminary injunction, the only matter for review is the action of the courts below respecting such injunction, and the Supreme Court cannot go further and decide the issues involved on their merits.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Meccano, Limited, against John Wanamaker, New York. An order granting a preliminary injunction (241 Fed. 133) was reversed by the Circuit Court of Appeals (250 Fed. 450, 162 C. C. A. 520), and plaintiff brings certiorari. Affirmed and remanded.

\*137

\*Messrs. Reeve Lewis and W. B. Kerkham, both of Washington, D. C., for petitioner.

Mr. H. A. Toulmin, of Dayton, Ohio, for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Proceeding against Wagner and others in the United States District Court, Southern District of Ohio, Meccano, Limited, obtained a decree (July 8, 1916) affirming the validity, and restraining infringement, of its patent for mechanical toys, also restraining unfair competition in making and selling such toys and the further infringement of its copyright

\*138

upon trade catalogue and illustrated manual relating thereto. *Meccano v. Wagner*, 234

Fed. 912. An appeal was taken to the Circuit Court of Appeals, Sixth Circuit. The same corporation instituted the present suit in the United States District Court, Southern District of New York (December 9, 1916) seeking like relief against John Wanamaker, a customer of Wagner.

The trial court granted a preliminary injunction, asked upon the bill, supporting affidavits and exhibits—January 12, 1917. It expressed general agreement with the conclusions announced in the Ohio cause and said:

"It seems quite apparent that the patent is infringed and that diagrams and directions as to construction have been borrowed by defendant from complainant's copyrighted catalogues, and that the system of construction adopted by the defendant is a direct imitation of complainant's system."

An appeal followed, pending which the Circuit Court of Appeals, Sixth Circuit (November, 1917), reversed the Ohio District Court's decree so far as it sustained the patent, approved it otherwise, and remanded the cause for further proceedings. *Wagner v. Meccano*, 246 Fed. 603, 158 C. C. A. 573.

January 25, 1918, after argument, but before determination of appeal from the preliminary order, petitioner moved for final decision on the merits, claiming that the decree of the Circuit Court of Appeals, Sixth Circuit, "is final and conclusive as to the case at bar, under principles enunciated by the Supreme Court." Being opposed, the motion was denied—March 24, 1918. The court said of it:

"This was a motion for a 'decision on the merits of this cause' by this court under the following circumstances: A suit was brought in the District Court for the Southern District of New York for an injunction for infringement of a copyright, and of a patent, and for unfair competition in the manufacture of a mechanical toy in absolute imitation of the plaintiff's. The

\*139

plaintiff applied for and got \*an injunction pendente lite [241 Fed. 133], from which the defendant appealed. That appeal is still pending undetermined in this court. Meanwhile the plaintiff had in the District Court required the defendant to answer certain interrogatories, by which it appeared that the defendant procured from one Wagner the toys which it sold in alleged unfair competition and in violation of the patent, and also the 'manuals' which went with the toys and explained their uses, which are alleged to infringe the copyright. The interrogatories further showed that Wagner had agreed to hold the defendant harmless for any sales of the toys and manuals, and that in pursuance of that undertaking he had taken a share in the defense of this suit. While it did not appear exactly what that share was, it may be assumed, for the purpose of the motion only, that Wagner has assumed the chief conduct of the case, and that the defendant remains only formally represented.

"The plaintiff sued Wagner in Ohio upon the three same causes of equity and obtained a decree upon all. Later an appeal was taken to the Circuit Court of Appeals for the Sixth Cir-

cuit, and the decree was affirmed except as to the patent, which was declared invalid, and which the plaintiff has now withdrawn from this suit. No final decree has been entered, and the Ohio cause now stands for an accounting in the District Court. This motion is upon the record in the Ohio suit, which is made a part of the moving papers, and it presupposes that this court may pass a final decree for the plaintiff upon the appeal from the injunction pendente lite, upon the assumption that that record is a complete estoppel against the defendant here and leaves open no issues for determination between the parties."

"We pass the question of practice whether this court, under the doctrine of *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856, may enter a decree for

\*140

the plaintiff upon such \*an appeal as that now pending. *Mast, Foos & Co. v. Stover Mfg. Co.*, supra, was a case where the bill was dismissed, and no case has so far held that the plaintiff could obtain an affirmative decree. As we think the motion must be denied upon the merits, we leave open the question whether the plaintiff may in any event so terminate the litigation. \* \* \* It is apparent that some of the issues are different from those litigated in Ohio; they involve, not only the defendant's rights to sell Wagner's toys and manuals, but any others which it may procure elsewhere. \* \* \* At best the rule in *Mast, Foos & Co. v. Stover Mfg. Co.*, supra, is limited to those cases in which the court can see that the whole issues can be disposed of at once without injustice to the parties. Whatever may be the result here, it is apparent that the case involves more than can be so decided." 250 Fed. 250, 162 C. C. A. 386.

April 15, 1918, the court below reversed the challenged preliminary order. After stating that the trial court very naturally followed the Ohio District Court, it referred to the partial reversal of the decree there announced and expressed entire agreement with the Circuit Court of Appeals, Sixth Circuit, in holding the patent invalid. And, having considered the evidence relating to copyright and unfair competition, it found no adequate ground for an injunction. 250 Fed. 450, 162 C. C. A. 386. The cause comes here by certiorari. See *Ex parte Wagner*, 249 U. S. 465, 39 Sup. Ct. 317, 63 L. Ed. 709.

[1, 2] Decrees by Circuit Courts of Appeals are declared final by section 128, Judicial Code (Comp. St. § 1120), in cases like the present one. We therefore had authority to bring this cause up by certiorari and may treat it as if here on appeal. Section 240, Judicial Code (Comp. St. 1217) *Harriman v. Northern Securities Co.*, 197 U. S. 244, 287, 25 Sup. Ct. 493, 49 L. Ed. 739; *Denver v. New York Trust Co.*, 229 U. S. 123, 136, 33 Sup. Ct. 657, 57 L. Ed. 1101. The power of Circuit Courts of Appeals to review preliminary orders granting injunctions arises from section 129, Judicial Code, which has been often considered. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L.

\*141

Ed. 810; \**Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 494, 20 Sup. Ct.

708, 44 L. Ed. 856; *Harriman v. Northern Securities Co.*, supra; *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055; *Denver v. New York Trust Co.*, supra. This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.

[3-5] The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed, unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley v. Columbia Phonograph Co.*, 122 Fed. 623, 58 C. C. A. 639; *Texas Traction Co. v. Barron G. Collier, Inc.*, 195 Fed. 65, 66, 115 C. C. A. 82; *Southern Express Co. v. Long et al.*, 202 Fed. 462, 120 C. C. A. 568; *City of Amarillo et al. v. Southwestern Telegraph & Telephone Co.*, 253 Fed. 638, 165 C. C. A. 264. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record.

[6] Pending the New York appeal the situation underwent a radical change—the Circuit Court of Appeals, Sixth Circuit, reversed the decree upholding petitioner's patent. Evidently the trial court had granted the preliminary injunction in entire reliance upon that decree, and after its reversal the court below properly took notice of and considered the changed circumstances. *Gulf, Colorado & Santa Fé Ry. v. Dennis*, 224 U. S. 503, 505, 506, 32 Sup. Ct. 542, 56 L. Ed. 860.

[7] Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it

\*142

clearly appears that \*no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. *Eagle Glass & Manufacturing Co. v. Rowe et al.*, 245 U. S. 275, 281, 38 Sup. Ct. 80, 62 L. Ed. 286.

Petitioner's motion to enter a disclaimer must be denied.

[8] If the two Circuit Courts of Appeals have expressed conflicting views, we cannot now declare which is right or undertake finally to decide the several issues involved upon their merits. The matter for review here is



the action of the courts below upon the preliminary order for injunction and we may go no further. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 311, 29 Sup. Ct. 495, 53 L. Ed. 805; *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267, 30 Sup. Ct. 505, 54 L. Ed. 757.

The judgment of the Circuit Court of Appeals is affirmed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

(253 U. S. 117)

*SPILLER v. ATCHISON, T. & S. F. RY. CO.*

*SAME v. CHICAGO & E. I. R. CO.*

*SAME v. CHICAGO & A. R. CO.*

*SAME v. MISSOURI PAC. RY. CO.*

*SAME v. ST. LOUIS, I. M. & S. RY. CO.*

*SAME v. ST. LOUIS & S. F. R. CO.*

*SAME v. CHICAGO, R. I. & P. RY. CO.*

*SAME v. ILLINOIS CENT. R. CO.*

*SAME v. MISSOURI, K. & T. RY. CO.*

(Argued Jan. 15, 1920. Decided May 17, 1920.)

Nos. 137-145.

1. COURTS ⇨382(1)—JUDGMENT OF CIRCUIT COURT OF APPEALS IN ACTION ON REPARATION ORDER REVIEWABLE BY SUPREME COURT; "FINAL JUDGMENT."

A judgment of the Circuit Court of Appeals in an action to recover amounts awarded by a reparation order of the Interstate Commerce Commission is not made final by Judicial Code, § 128, as amended by Act Jan. 28, 1915, § 2 (Comp. St. § 1120), and is therefore reviewable by writ of error under section 241 (Comp. St. § 1218), if it is final in the sense of concluding the litigation and involves the jurisdictional amount.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. COURTS ⇨382(1)—JUDGMENT OF CIRCUIT COURT OF APPEALS GRANTING NEW TRIAL NOT REVIEWABLE BY WRIT OF ERROR.

A judgment of the Circuit Court of Appeals, reversing a judgment of the District Court and granting a new trial, is not reviewable on writ of error, as it calls for further proceedings in the trial court, and a writ of error will lie to review final judgments only.

3. COURTS ⇨383(1)—JUDGMENT OF CIRCUIT COURT OF APPEALS INVOLVING LESS THAN \$1,000 REVIEWABLE BY CERTIORARI; "FINAL JUDGMENT."

A judgment of a Circuit Court of Appeals involving less than \$1,000 is made "final" by the combined effect of Judicial Code, §§ 128, 241 (Comp. St. §§ 1120, 1218), and is therefore reviewable by certiorari under section 240 (Comp. St. § 1217).

4. COURTS ⇨383(1)—JUDGMENT OF CIRCUIT COURT OF APPEALS GRANTING A NEW TRIAL REVIEWABLE BY CERTIORARI; "FINAL JUDGMENT."

Though a judgment of a Circuit Court of Appeals, reversing the judgment of the District

Court and granting a new trial, is not a "final judgment" if it is advisable to review such judgment without further protracting the litigation it is reviewable by certiorari under Judicial Code, § 262 (Comp. St. § 1239), authorizing the Supreme Court to issue all writs necessary for the exercise of its jurisdiction.

5. COMMERCE ⇨95—REPARATION ORDER NOT REJECTED WHEN EVIDENCE BEFORE THE COMMISSION IS NOT PRODUCED BEFORE THE COURT.

In an action to recover the amount awarded by a reparation order of the Interstate Commerce Commission, the order cannot be rejected as unsupported by evidence, when material documentary evidence before the commission has not been introduced before the court because of its bulk.

6. COMMERCE ⇨95—FINDINGS OF COMMISSION NOT INADMISSIBLE BECAUSE OF ERRORS OF PROCEDURE OR IN CONCLUSION.

Under Interstate Commerce Act Feb. 8, 1887, § 13, as amended by Act June 18, 1910, § 11 (Comp. St. § 8581), requiring the Interstate Commerce Commission to investigate claims for reparation in such manner and by such means as it shall deem proper, section 16, as amended by Act June 18, 1910, § 13 (Comp. St. § 8584), making its findings and order prima facie evidence, and section 17, as amended by Act March 2, 1889, § 6 (Comp. St. § 8586), authorizing it to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, where the essential facts found are based on substantial evidence, and there has been no denial of the right to a fair hearing, its findings and order may not be rejected as evidence because improper evidence was admitted, or the best possible available evidence was not produced or a different conclusion might have been reached.

7. COMMERCE ⇨87—EVIDENCE HELD TO SUPPORT FINDINGS OF COMMISSION IN REPARATION PROCEEDING.

In a proceeding before the Interstate Commerce Commission for reparation in connection with excessive freight charges on shipments of cattle, where the claims were based in most cases upon data furnished by commission houses to which the cattle were consigned, evidence that few of shippers kept books, and that they relied upon commission companies to do this, and that the companies made a practice of paying the freight, selling the cattle, and remitting the proceeds after deducting the freight in connection with the verification of the claims by the carriers, *held* to sustain findings that the shippers whose names were mentioned in the claims sustained damages to the extent of the excessive charges as determined by the commission.

8. COMMERCE ⇨87—COMMISSION ENTITLED TO TREAT CHECKING OF CLAIMS BY CARRIERS AS EVIDENCE, AND NOT LIMITED BY QUALIFYING STATEMENTS.

Where, in a proceeding before the Interstate Commerce Commission for reparation, a summary of the claims showing the consignor, consignee, etc., were submitted to the carriers for investigation, and the carriers, in addition to check marks and other marks indicating that the items were correct, inserted waybill references, car numbers, etc., though they undertook

to qualify the effect of the checking, the commission was justified in according to the reports of the checking an evidential effect not limited by the qualifying statements.

9. COMMERCE ⚡88—COMMISSION'S REPARATION REPORT NOT NULLITY FOR FAILURE TO EXAMINE BOOKS ON WHICH CLAIMS WERE BASED.

Where there was substantial evidence in a proceeding before the Interstate Commerce Commission for reparation that the owners specified in the claims had been subjected to the excessive charges found by the commission, its report could not be treated as a nullity in an action to recover the amounts awarded because of the failure to appoint an examiner to investigate the books of commission merchants on which most of the claims were based, as was at first intended.

10. COMMERCE ⚡95—QUALIFICATIONS OF EXPERT A QUESTION FOR COMMISSION, WHOSE DECISION WILL NOT BE SET ASIDE WHEN NOT UNFOUNDED.

Whether a witness before the Interstate Commerce Commission in a reparation proceeding who had been connected with a cattle raiser's association for eight years had shown such special knowledge as to qualify him to testify as an expert as to the customary course of business of cattle shippers and commission merchants was for the commission to determine, and its decision thereon, when not clearly shown to have been unfounded, will not be set aside by the courts.

11. COMMERCE ⚡95—CONSIDERATION OF HEARSAY EVIDENCE IN CONNECTION WITH ADMISSIBLE EVIDENCE NOT GROUND FOR REJECTING COMMISSION'S FINDINGS.

Where hearsay evidence was introduced before the Interstate Commerce Commission in a reparation proceeding without objection, and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the findings and order of the commission may not be rejected as unsupported by evidence, because the hearsay evidence was considered with the rest, especially as the order is only prima facie evidence.

12. COMMERCE ⚡95—DENIAL OF MOTION TO FIND FOR DEFENDANTS PROPER WHERE PART OF CLAIM BEFORE COMMISSION WAS SUPPORTED BY EVIDENCE.

In an action to recover amounts awarded plaintiff on assigned claims by a reparation order of the Interstate Commerce Commission, a motion for rulings that on all the evidence plaintiff was not entitled to recover, and that there was not sufficient evidence before the commission to sustain its order, was properly overruled, where some of the claims were supported by evidence, as the request for an adverse ruling should not have been directed to the award in toto.

13. COMMERCE ⚡87—FORMAL PROOF OF HANDWRITING OF PERSONS ASSIGNING CLAIMS FOR REPARATION UNNECESSARY.

In a reparation proceeding before the Interstate Commerce Commission prosecuted by a cattle raisers' association, where it was shown that the association was prosecuting the claims

for the benefit of the owners, and a representative of the association had possession of assignments made to him, this constituted a reasonable assurance of their genuineness, and formal proof of the handwriting of the assignors by subscribing witness or otherwise was not necessary.

14. COMMERCE ⚡87—ASSIGNEE ENTITLED TO REPARATION AWARD AND RECOVERY THEREON, THOUGH NOT HOLDING BENEFICIAL TITLE.

Assignments absolute in form of claims for reparation on account of excessive freight charges vested the legal title in the assignee, and entitled him to claim award of reparation and recover it by action at law brought in his own name for the benefit of the assignors, though the purpose of the assignment was not such as to vest him with the beneficial or equitable title.

15. ASSIGNMENTS ⚡26—CLAIM FOR REPARATION FOR OVERPAYMENT TO CARRIER IS ASSIGNABLE.

Though Interstate Commerce Act, §§ 8, 9 (Comp. St. §§ 8572, 8573), section 13, as amended by Act June, 18, 1910, § 11 (Comp. St. § 8581), and section 16, as amended by Act June 29, 1906, § 5 (Comp. St. § 8584), relative to damages for violations thereof and awards for reparation, does not mention representatives or assigns of the person aggrieved, a claim for reparation is assignable, as the claim is for compensation and not for a penalty, and assignable in the absence of any expression of a legislative intent to the contrary.

16. COMMERCE ⚡85—RULING OF COMMISSION AS TO RECOGNIZING ASSIGNMENTS OF CLAIMS FOR REPARATION MAY BE DISREGARDED BY IT.

A ruling of the Interstate Commerce Commission that in an award for reparation it would not recognize an assignment to a stranger to the transportation records treated as an administrative regulation constituted no limitation upon the jurisdiction of the commission, and might be disregarded by it.

In Error and on Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by E. B. Spiller against the Atchison, Topeka & Santa Fé Railway Company, the Chicago & Eastern Illinois Railroad Company, the Chicago & Alton Railroad Company, the Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, the St. Louis & San Francisco Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Illinois Central Railroad Company, and the Missouri, Kansas & Texas Railway Company. A judgment for plaintiff was reversed by the Circuit Court of Appeals (246 Fed. 1, 158 C. C. A. 227), and rehearing was denied (249 Fed. 677, 161 C. C. A. 587), on separate writs of error taken by each defendant, and plaintiff brings error and petitions for certiorari. Writs of error dismissed. Writs of certiorari allowed. Judgment of the Circuit Court of Appeals reversed, and judgment of District Court affirmed.



## \*119

\*Messrs. Buckner F. Deatherage, of Kansas City, Mo., and S. H. Cowan, of Ft. Worth, Tex., for plaintiff in error.

Messrs. T. J. Norton and Gardiner Lathrop, both of Chicago, Ill., for defendants in error.

## \*120

\*Mr. Justice PITNEY delivered the opinion of the Court.

Plaintiff in error commenced an action against defendants in error jointly in the District Court of the United States for the Western District of Missouri under section 16 of the act to regulate commerce as amended (Act Feb. 4, 1887, c. 104, 24 Stat. 379, 384; Act June 29, 1906, c. 3591, § 5, 34 Stat. 584, 590; Act June 18, 1910, c. 309, § 13, 36 Stat. 539, 554 [Comp. St. § 8584]), to recover certain amounts awarded to him against them respectively in a reparation order made by the Interstate Commerce Commission January 12, 1914. His petition contained also a count setting up a conspiracy between defendants for the restraint of interstate commerce, and claiming treble damages under section 7 of the Sherman Anti-Trust Act of July 2, 1890 (chapter 647, 26 Stat. 209, 210 [Comp. St. § 8829]); but this was abandoned at the trial. Defendants having filed separate answers, a jury was waived by stipulation, and a test case tried before the court—all defendants participating—with the result that a decision was rendered in favor of plaintiff, pursuant to which a combined judgment was entered, amounting in effect to as many judgments as there were defendants, each for the amount of the commission's award against the particular defendant with interest and attorneys' fees. Defendants sued out separate writs of error from the Circuit Court of Appeals, where, by stipulation, the cases were heard together upon a single record. That court reversed the judgments, ordered the cause remanded to the District Court with directions to grant a new trial (Atchison, T. & Santa Fé R. Co. v. Spiller, 246 Fed. 1, 158 C. C. A. 227), and refused an application for a rehearing (249 Fed. 677, 161 C. C. A. 587). Writs of error were prayed for and allowed for the review of the judgments of reversal in this court; and afterwards but in due season a petition for the allowance of a writ of certiorari was filed, the consideration of which was postponed to the hearing under the writs of error.

[1, 2] The jurisdiction of the District Court

## \*121

having been invoked not because of diversity of citizenship but because the suit was one arising under laws of the United States other than those particularly mentioned in section 128, Judicial Code, as amended (Act Jan. 28, 1915, c. 22, § 2, 38 Stat. 803 [Comp. St. § 1120]), it follows that the judgments were not made "final" by the section referred to, and, if

final in the sense of concluding the litigation, would be reviewable in this court by writ of error pursuant to section 241, Judicial Code (Comp. St. § 1218), in each case where the matter in controversy exceeds \$1,000, besides costs. In the cases of the Chicago & Alton and the Missouri Pacific Companies, the respective judgments with interest up to the issuance of the writs of error from this court were materially less than \$1,000; in each of the other cases substantially in excess of that amount; the aggregate of the judgments being more than \$150,000. For want of a sufficient amount in controversy the two smaller judgments would not be reviewable here by writ of error even were they final in effect; but all the writs of error must be dismissed because the judgments call for further proceedings in the trial court; it being elementary that this writ will lie to review final judgments only. *McLish v. Roff*, 141 U. S. 661, 665, 12 Sup. Ct. 118, 35 L. Ed. 893; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 341, 13 Sup. Ct. 356, 37 L. Ed. 194; *Heike v. United States*, 217 U. S. 423, 429, 30 Sup. Ct. 539, 54 L. Ed. 821.

[3, 4] However, upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments; the transcript of the record and proceedings returned in obedience to the writs of error to stand as the return to the writ of certiorari. This writ is allowable by virtue of section 240, Judicial Code (derived from section 6 of the Act of March 3, 1891, c. 517, 26 Stat. 826, 828 [Comp. St. § 1217]), in the case of the two smaller judgments, because the decision of the Circuit Court of Appeals is made final by the combined effect of sections 128 and 241;

## \*122

and in the case of \*the larger judgments it is allowable under section 262 of the Code (section 716, Revised Stat. U. S. [Comp. St. § 1239]), in aid of the ultimate jurisdiction of this court to review those cases by writs of error. *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 12 Sup. Ct. 517, 36 L. Ed. 340; *In re Chetwood, Petnr.*, 165 U. S. 443, 462, 17 Sup. Ct. 385, 41 L. Ed. 782; *Whitney v. Dick*, 202 U. S. 132, 135, 26 Sup. Ct. 584, 50 L. Ed. 963; *McClellan v. Carland*, 217 U. S. 268, 277, et seq., 30 Sup. Ct. 501, 54 L. Ed. 762; *United States v. Beatty*, 232 U. S. 463, 467, 34 Sup. Ct. 392, 58 L. Ed. 686; *Meeker v. Lehigh Valley R. R. Co.*, 234 U. S. 749, 34 Sup. Ct. 674, 15 L. Ed. 1576; *Id.*, 236 U. S. 412, 417, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691.

Coming to the merits: The ground upon which the Circuit Court of Appeals reversed the judgments, and the ground principally relied upon to sustain its decision was

the refusal by the trial court of a motion made by defendants to hold: (a) That upon all the evidence plaintiff was not entitled to recover against any or all of the defendants; and (b) that there was not sufficient evidence before the commission to sustain its order of reparation. The latter is the substantial question actually presented.

The course of proceedings at the trial, as appears from the bill of exceptions, was as follows: Plaintiff introduced the report of the Interstate Commerce Commission (unreported opinion No. A—583 in case No. 732, Cattle Raisers' Association of Texas v. Missouri, Kansas & Texas Railway Co., dated January 12, 1914), and the order of reparation made pursuant to it and upon which the action was based. Defendants having admitted the service of the order, and that the money awarded had not been paid, plaintiff rested. The report makes an award in favor of Spiller, plaintiff in error, as assignee of a large number of claims for reparation by reason of excessive rates charged by the respective carriers on interstate shipments of cattle from points of origin in Texas, Oklahoma, New Mexico, Colorado, and Kansas, to destinations at Kansas City, St. Louis, Chicago, St. Joseph, and New Orleans, on various dates between August 29, 1906, and November 17, 1908; and a further award to named shippers in the case of certain unassigned claims pertaining to similar ship-

\*123

ments; the \*several claims, assigned and unassigned, with distinguishing marks, being set forth in Appendix A, showing the delivering carriers against which the claims were allowed and, in each case, the consignor, points of origin and destination, number of cars shipped, weight, rate paid, the lower rate sanctioned by the commission, amount of refund required, and the interest thereon. The report contains appropriate findings adequate to support the award, among them the following: That the persons named in Appendix A as consignors shipped from the points of origin to the points of destination specified, by the line of road named as the "delivering road," the number of cars and of the aggregate net weight stated; that the shippers paid to the delivering carriers freight upon the shipments at certain rates named; that in each instance this rate was unreasonable and excessive, and a reasonable rate to have been charged would have been the lower rate specified as having been subsequently established by the commission, and that therefore the delivering carriers collected from the shippers unreasonable charges on account of the shipments in amounts named in the column headed "Amount of Refund"; that the shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm; that the freight was paid in the first instance by the "consignor"

(evidently a misprint for "consignee") to the delivering carrier, and subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance, so that in all cases the owner and shipper of the cattle finally paid the transportation charges; and that by the unreasonable exactions of the carriers the shippers were damaged in the amounts stated in the appropriate column of Appendix A, since they received for the cattle less by those amounts than they would have received had the rate found reasonable been

\*124

charged; that in the case of \*some of the claims the shippers made assignments to H. E. Crowley, then being secretary of the Cattle Raisers' Association, in a form set forth in the report; that subsequently Crowley ceased to be such secretary, and was succeeded by Spiller, the plaintiff, to whom Crowley assigned all claims previously assigned to him; and that other specified claims were assigned by the shippers to Spiller after he became secretary, the form of assignment being the same as that previously employed.

Defendants, endeavoring to show the insufficiency of the evidence upon which the findings and order of the commission were based, introduced a transcript of the stenographer's notes of the testimony taken upon the hearing of the reparation claims, following this by introducing a sample page taken from one of the exhibits introduced before the commission as illustrative of the form of exhibits there introduced. After other evidence not necessary to be mentioned, and a request for judgment in favor of defendants, and for certain rulings on points of law that would have produced that result, all of which were refused, the case was closed.

It appears that in February, 1904, the Cattle Raisers' Association of Texas, in behalf of its members and of others interested, petitioned the Interstate Commerce Commission under section 13 of the Commerce Act (Comp. St. § 8581), alleging the rates in force in the territory in question to be unjust and unreasonable, they having been advanced some time before to the extent (in most cases) of 3 cents per hundred pounds. On August 16, 1905, the commission held (Cattle Raisers' Association of Texas v. Missouri, Kansas & Texas Ry. Co., 11 Interst. Com. Com'n R. 296, 352) that the then existing rates were unjust and unreasonable by the amount of the advance. At this time the commission was not empowered to fix rates for the future. This power having been conferred by the Hepburn Act of June 29, 1906 (chapter 3591, 34 Stat. 584, 589 [Comp. St. § 8583]), which, by joint resolution of June 30, 1906 (34 Stat. 838),

\*125

\*took effect 60 days after its approval by the President, or on August 28, 1906, the Cattle Raisers' Association immediately thereafter applied for and obtained a reopening of the



matter, to the end that reasonable rates might be established; and on April 14, 1908, the commission decided that the former rates should be restored, but that reparation would not be allowed upon claims accruing prior to August 29, 1906 (date of the application). 13 Interst. Com. Com'n R. 418, 435. The reduced rates finally were put into effect November 17, 1908.

The reparation claims in controversy appear to have been filed in due season by the Cattle Raisers' Association in behalf of its members and other shippers interested, and in the names of the alleged owners of the cattle shipped.

[5] The transcript of the testimony taken by the commission, as introduced in evidence in the District Court, forms the basis of the decision of the Circuit Court of Appeals that the reparation order was unsupported by evidence. But the transcript shows that important documentary evidence was introduced, and furnished the principal foundation for the findings made. This documentary evidence (except the single sheet offered for purposes of illustration) was not introduced in the District Court, in order, as stated by counsel, to "avoid introducing a number of papers that would almost fill a farm wagon." But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the commission to support it when the whole of the evidence that was before the commission was not produced.

[6] That this is a matter of substance will appear from a review of the course of the proceeding as disclosed by the stenographer's transcript. The evidence was taken by Mr. Commissioner Prouty at Chicago; there being three sessions, the first on September 19 and 20, 1912, the second on January 24 and the third on October 17 in the following year. They were held in the presence of counsel

\*126

for the \*Cattle Raisers' Association, who appeared for the claimants, and counsel for the several carriers interested. If we were called upon to review the proceeding as upon a writ of error or appeal it might be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of the judicial review is not so extensive. Section 13 of the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379, 383, amended June 18, 1910 [chapter 309, 36 Stat. 539, 550]) requires the commission on receipt of a claim for reparation to proceed on notice to the carrier to "investigate the matters complained of in such manner and by such means as it shall deem proper"; and by section 16 (34 Stat. 590; 36 Stat. 554), if, after such hearing, the commission shall determine that any

party complainant is entitled to an award of damages, the commission is to make an order of reparation accordingly, and in a suit based thereon "the findings and order of the commission shall be prima facie evidence of the facts therein stated." The same section contemplates that numerous parties may unite in a claim for reparation, and that numerous carriers may be joined as defendants; and similarly that in a suit brought upon such award there may be a joinder of parties plaintiff and defendant. And, by section 17 (24 Stat. 385; 25 Stat. 861 [Comp. St. § 8586]), "the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

\*127

[7-9] \*In the present case, the hearing was informal, but not to the extent of sacrificing essential rights of parties; and it cannot be characterized as arbitrary or unfair. Many carriers were interested, and they were represented by counsel. Thousands of carload shipments were in question, but the points in real controversy were few, and there was a natural desire on all sides to expedite the hearing. In the main, counsel for the carriers co-operated in facilitating the investigation. It was not in dispute that all shipments under inquiry were made during a period when the tariff rates were under investigation, and that afterwards those rates were determined by the commission to have been excessive. It appeared that itemized claims for reparation had been made out in duplicate (one copy of each being filed), in the names of the parties alleged to have made shipments of cattle as owners during the period in question, that these were based in most cases upon data furnished by the commission houses at the several points of destination, as taken from their books, in other cases by the shippers themselves, and that they were computed by applying the excess charges, as determined, to the actual weights of the shipments where known, in other cases to the minimum carload weights. There was evidence that a few of the cattle shippers kept books, they relying upon the commission companies to do this, and that such companies were the consignees of the cattle, and made it a practice on receiving a shipment to pay the freight, sell the cattle, and remit the proceeds to the owner after deducting the freight paid and other charges. During the hearing, there was drawn off

from the claims as made up and filed a summary for each carrier, purporting to show the consignor, consignee, originating road, point of origin, destination, date of delivery, number of cars moved, rate paid, rate established by the commission, and the overcharge claimed. These were submitted to the several carriers for investigation by their ac-

\*128

counting officers, and \*some months later were reported back to Commissioner Prouty by their counsel with the results of such investigation, which in a majority of instances verified the statements said to have been deduced from the records of the commission houses. In some cases, in addition to check marks, "O. K." and other marks indicating that the items had been found correct, way-bill references, car numbers, initials, etc., had been inserted; and where it had been found impossible to locate a shipment there were comments tending to add support to the verification of those that were located. No reparation was awarded by the commission except with respect to such shipments as were acknowledged in the reports of the defendants to have moved as stated. These reports were introduced in evidence before Commissioner Prouty, but, as already shown, were not in evidence before the District Court. What we have said as to their contents is gathered from the stenographer's transcript; what else may have appeared upon their face, in the nature of admissions, is left to be inferred. Counsel for some of the carriers undertook to qualify the effect of admissions contained in them, as by saying that the checking meant no more than that a particular car moved as stated, and that the carrier collected the amount of freight specified; that it was not intended to admit that remittance was made to the person named as claimant; that the statements were subject to confirmation by the books of the commission merchants, or the like. But the commission was justified in according to the reports of the checking an evidential effect, not limited by the qualifying statements, treating the latter as merely argumentative. It might regard the fact that the shipments could be and were identified from the records of the carriers, in the manner described, as evidence that the details respecting the shippers of the cattle and the particulars of the shipments were true; might take the movement and delivery of

\*129

the freight thus \*acknowledged as evidence that the delivering carrier collected the freight charges according to the published tariffs, which of course included the overcharges; and might take this, in connection with the evidence as to the course of business, as showing that the shippers whose names were mentioned in the statements sustained damages to the extent of the excessive charge as determined by the commission. The minutes show that until near the conclu-

sion of the hearing it was the intention to appoint an examiner to investigate the books of the commission merchants at the various points of destination in order to verify the details of the several shipments, and that this purpose was abandoned in view of the admissions made by the carriers. Perhaps it ought to have been carried out; but the court was not justified in treating the report of the commission as a nullity for this reason, if there was substantial evidence of the essential facts without such verification. We think that what we have detailed of the course of the hearing, taken in connection with what we know and what may be presumed as to the contents of the unproduced documentary evidence, shows there was substantial evidence that the owners specified in the claims had been subjected to the excessive charges with respect to the shipments acknowledged by the carriers; and, as already remarked, the award of reparation was confined to these shipments.

[10] The opinion of the Circuit Court of Appeals severely criticizes the evidence on which these conclusions were based, characterizing it as hearsay. It is not to be disputed that much of the evidence—including essential parts of it—is properly so characterized. The only witness sworn was Mr. Williams, assistant secretary of the Cattle Raisers' Association, who had gathered the data upon which the claims were based, mostly from commission merchants, in some instances from the cattle shippers. He had

\*130

prepared the claims, had spent much \*time and pains in investigating them, and in the course of his duties had visited several of the points of destination and examined the books and records of the commission merchants to ascertain the method in which their business was conducted and records kept. It was he who testified as to the customary course of business of cattle shippers and commission merchants. He had been connected with the Cattle Raisers' Association for about eight years, and might be presumed to have some general familiarity with the business in addition to that gained in the special study he had made of it while investigating the claims. His explanation of the method of business and the details of the claims was accepted, and accepted without objection, very much as the testimony of an expert witness might have been accepted. Whether he had shown such special knowledge as to qualify him to testify as an expert was for the Interstate Commerce Commission to determine; and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded, which cannot be said in this case. *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520, 527, 9 Sup. Ct. 601, 32 L. Ed. 1035; *Montana Ry. Co. v. Warren*, 137 U. S. 348, 353, 11 Sup. Ct. 96, 34 L. Ed. 681.



The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the commission. Counsel did in some instances assert that there was a failure of proof, and suggest that the proceeding ought to be dismissed. But the objections came too late, and were too general in character, to be equivalent to an objection to the reception of the evidence because hearsay. Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible. *Diaz v. United States*, 223 U. S. 442, 450, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; *Rowland v. St. Louis & S. F. R. R. Co.*, 244 U. S. 106, 108, 37 Sup. Ct. 577, 61 L. Ed. 1022; *Damon v. Carrol*, 163 Mass. 404, 408, 40 N. E. 185. And it is clear that the verification of the details of

\*131

the \*claims by the carriers after full investigation by their auditing departments constituted primary evidence against them, and went far towards showing that the facts as disclosed by the hearsay evidence might be depended upon.

[11] We are not here called upon to consider whether the commission may receive and act upon hearsay evidence seasonably objected to as hearsay; but we do hold that in this case, where such evidence was introduced without objection and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the commission is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because the hearsay evidence was considered with the rest.

In *Interstate Com. Comm. v. Baird*, 194 U. S. 25, 44, 24 Sup. Ct. 563, 569 (48 L. Ed. 860), it was said:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."

In *Interstate Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 187 (57 L. Ed. 431), the court recognized that—

"The commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties."

And the fact that a reparation order has at most only the effect of prima facie evidence (*Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 430, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691; *Meeker v. Le-*

*high Valley R. R.*, 236 U. S. 434, 439, 35 Sup. Ct. 337, 59 L. Ed. 659; *Mills v. Lehigh Valley R. R.*, 238 U. S. 473, 482, 35 Sup. Ct. 888, 59 L. Ed. 1414), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for

\*132

not binding down the \*commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted.

In this case the commission did not act upon evidence of which the carriers were not cognizant and to which they had no opportunity to reply, as in the case supposed in *Interstate Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91, 93, 33 Sup. Ct. 185, 57 L. Ed. 431. All the carriers participated in the hearing, and had full opportunity to object, to cross-examine, and to introduce evidence on their own part.

It is objected that the evidence failed to show who owned the cattle shipped or who paid the freight. This cannot be sustained. True, it appeared that the cattle were not in all instances billed in the name of the owner, but sometimes in the name of a caretaker, his name being inserted in the bill as evidence of his right to free transportation. But it is probable that in the latter cases there was a want of correspondence between the claims as presented and the carriers' books, and that for want of checking by the carriers they were omitted from the award. The evidence upon the whole was sufficient to sustain a finding, so far as the claims were allowed, that the parties in whose behalf they were allowed were consignors of the shipments and presumably owners of the cattle shipped.

[12] If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void in toto. This was not erroneous if to any substantial extent the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these.

The principal defense before the commission was that the payment of a published rate afterwards decided to have been excessive was not evidence that the party who

\*133

paid \*the freight sustained damage to the extent of the excess. The Circuit Court of Appeals sustained this contention at the first hearing. 246 Fed. 1, 23, 158 C. C. A. 227. But it has since been ruled otherwise by this court (*Southern Pacific Co. v. Darnell-Taenzler Co.*, 245 U. S. 531, 534, 38 Sup. Ct. 186, 62 L. Ed. 451), and, in view of this, upon the rehearing the Circuit Court of Appeals withdrew this part of its former opinion (249 Fed. 677, 161 C. C. A. 587).

[13] That court held, further, that upon the undisputed evidence the legal title to the claims for reparation never vested in Spiller, and hence that the commission was wholly without authority to order reparation to be made to him. The minutes show that of the claims in favor of Spiller a number had been assigned to Crowley when he was secretary of the Cattle Raisers' Association, and afterwards assigned by him to Spiller when Crowley retired and Spiller succeeded him; that other claims were assigned by the consignors to Spiller direct; and that still others had not been assigned. The assignments were produced before Commissioner Prouty, and an offer made to file them, but as we interpret the minutes this was waived, a copy of one of the assignments (they were said to be alike in form) being inserted in the stenographer's notes instead. There was evidence that the assignments were made for nominal considerations because the Cattle Raisers' Association was prosecuting the claims for the benefit of the owners thereof. In the schedule of the claims as submitted to the commission those assigned were suitably identified, and the commission awarded reparation to Spiller upon these, and in other cases made the order in favor of the parties named as owners. There was substantial evidence to support the finding that the claims had been assigned. Formal proof of the handwriting of the assignors by subscribing witnesses or otherwise was not necessary in so summary a hearing, in the absence of objection or contradiction. What

\*134

was shown as \*to the relation of the shippers to the association and the possession of the instruments of assignment by the representative of the association who was prosecuting the claims gave a reasonable assurance of the genuineness of the instruments.

[14] The Circuit Court of Appeals held further, however, that, supposing there was sufficient evidence to support the finding that the claims had been legally assigned to Spiller, it showed that the purpose of the assignment was not such as to vest the legal title to the claims in him so as to authorize the commission to make the award of damages in his name. To this we cannot assent. The assignments were absolute in form, and plainly their effect—supposing the claims to be assignable—was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

[15] We have said enough to show that the reversal of the judgments of the District Court cannot be sustained on the

grounds upon which the Circuit Court of Appeals based it. It is insisted, however, that, failing this, the same result ought to have been reached upon the ground that the provisions of the Commerce Act do not permit an assignment of a claim for reparation to a third party and hence the Interstate Commerce Commission was without jurisdiction to award reparation to Spiller. This is based upon the language of sections 8 and 9 (Comp. St. §§ 8572, 8573), which remain in their original form, of section 13, as amended June 18, 1910 (chapter 309, 36 Stat. 550), and of section 16 as amended June 29, 1906 (34 Stat. 584). Section 8 (24 Stat. 382) makes the common carrier, for anything done contrary to the prohibition of the act, "liable

\*135

to the person or \*persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act." Section 9 entitles any person claiming to be damaged either to make complaint to the commission or to "bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable." Section 13 contains nothing that need be quoted. Section 16 as amended (34 Stat. 590) provides that where an award of damages is made by the commission and the carrier does not comply with the order, "the complainant, or any person for whose benefit such order was made" may bring suit. Stress is laid upon the absence of language expressly extending the remedy to the representatives or assigns of the person aggrieved; but we attribute no controlling significance to this. The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier must receive a reasonably liberal and not a narrow interpretation. A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature (*Comegys v. Vasse*, 1 Pet. 193, 213, 7 L. Ed. 108; *Erwin v. United States*, 97 U. S. 392, 395-396, 24 L. Ed. 1065), and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary. We find nothing in the letter or spirit of the act inconsistent with such assignability. We are referred to certain expressions in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533, 534, 38 Sup. Ct. 186, 62 L. Ed. 451; but they do not bear upon the present question, and are not inconsistent with the view that reparation claims are assignable.

[16] The Interstate Commerce Commission, by Conference Ruling No. 362 (June 4, 1912), declared:



"In awarding reparation the commission will recognize an assignment \*by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records."

See *Robinson Co. v. American Express Co.*, 38 Interst. Com. Com'n R. 733, 735. So far as this involves a construction of the act, we are unable to accept it, for reasons that have been indicated. Treating it as an administrative regulation, it of course constituted no limitation upon the jurisdiction of the commission, even were it consistent with a correct construction of the act, which we hold it was not. In any event, the commission had power to disregard the regulation, as in effect it did by recognizing the assignments in this case.

Other points discussed in the argument require no special comment.

It results that the judgments of the Circuit Court of Appeals must be reversed, and those of the District Court affirmed.

Writs of error dismissed.

Writs of certiorari allowed.

Judgments of Circuit Court of Appeals reversed, and judgments of District Court affirmed.

(253 U. S. 170)

CALHOUN v. MASSIE.

(Argued March 11, 1920. Decided May 17, 1920.)

No. 294.

1. UNITED STATES ~~§~~111—CONTRACT PROVISION MAKING ATTORNEY'S FEE LIEN ON CLAIM VOID.

A provision of a contract employing an attorney on a contingent fee to prosecute a claim against the government that the fee should be a lien on any warrant issued in payment of the claim was void under Rev. St. § 3477 (Comp. St. § 6383), prohibiting transfers and assignments of claims against the United States.

2. UNITED STATES ~~§~~111—STATUTE MAKING APPROPRIATION FOR CLAIMS HELD TO LIMIT AMOUNT PAYABLE ATTORNEY BY CLAIMANT.

Omnibus Claims Act March 4, 1915, § 4, providing that no part of the amount of any item appropriated by that act shall be paid or delivered to any agent or attorney for services in excess of 20 per cent. of the amount appropriated, and that it shall be unlawful for any attorney to withhold or receive any sum in excess of the specified percentage, any contract to the contrary notwithstanding, limits the amount recoverable by the attorney from the claimant, and not merely the amount payable from the specific fund received from the government.

3. CONSTITUTIONAL LAW ~~§~~278(7)—UNITED STATES ~~§~~94—STATUTE VALID THOUGH LIMITING AMOUNT RECOVERABLE BY ATTORNEY ON CLAIMANT'S PERSONAL OBLIGATION.

Omnibus Claims Act March 4, 1915, construed as limiting the amount recoverable from

a claimant by his attorney upon his personal obligation, does not, as applied to a contract with an attorney for a greater compensation, in existence at the time of its passage, the services contemplated by which had been substantially performed, deprive the attorney of liberty and property in violation of Const. Amend. 5, especially where at the time the contract was made there was no legislation conferring on the claimant any right of recovery, and the parties knew that Congress might refuse to recognize the claim or might impose such conditions as it deemed proper.

4. UNITED STATES ~~§~~111—ATTORNEY ACCEPTING AMOUNT OF FEE AS LIMITED BY APPROPRIATION ACT BOUND THEREBY.

Under Omnibus Claims Act March 4, 1915, making it unlawful for any attorney to collect any sum exceeding 20 per cent. of the amount of any item appropriated, any contract to the contrary notwithstanding, where an attorney for a claimant received from the treasury a warrant for 20 per cent. of the sum appropriated, he took under the act and could not repudiate its provisions and any reservation by him of his rights under the contract was futile.

Mr. Justice McReynolds, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice Pitney, dissenting.

On Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

Action by C. C. Calhoun against Bland Massie. Judgment for defendant on demurrer was affirmed by the Supreme Court of Appeals of Virginia (123 Va. 673, 97 S. E. 576), and plaintiff brings certiorari. Affirmed.

See, also, 249 U. S. 596, 39 Sup. Ct. 289, 63 L. Ed. 794.

\*171

\*Mr. Charles F. Consaul, of Washington, D. C., for petitioner.

Mr. James R. Caskie, of Lynchburg, for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Omnibus Claims Act (Act March 4, 1915, c. 140, 38 Stat. 962), made appropriations for the payment of 1,115 claims arising out of the Civil War which had, from time to time during the preceding 28 years, been referred by resolution of the House or of the Senate to the Court of Claims for investigation, either under the Bowman Act (Act March 3, 1883, c. 116, 22 Stat. 485), or under the Tucker Act (Act March 3, 1887, c.

\*172

359, 24 Stat. \*505), or under section 151 of the Judicial Code (Comp. St. § 1142). Among the claims which that court reported favorably was one of Bland Massie, which had been referred to it by resolution of the House on February 3, 1911.<sup>1</sup> By section 1 of

<sup>1</sup> 63d Congress, 2d Session, House Report No. 97; Senate Report No. 357; 63d Congress, 1st Session, House Doc. 64.

the Omnibus Claims Act (page 989), the Secretary of the Treasury was directed to pay Massie \$1,900. Section 4 of the act (page 996), provided as follows:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

Massie had executed on April 18, 1911, an agreement as follows:

"*Fee Agreement.*—This agreement witnesseth: That I, Bland Massie, of Tyro, Nelson county, Virginia, have employed C. C. Calhoun, of Washington, D. C., as my attorney to prosecute my claim against the government of the United States for property taken by the federal forces during the late Civil War, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay him, his heirs or legal representatives as a fee a sum equal

\*173

to 50 per cent. of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim."

Calhoun prosecuted Massie's claim before the Court of Claims and secured the allowance of a motion to transmit its report to Congress, which thereafter made the appropriation above stated. On May 5, 1915, the government paid the \$1,900 by means of two treasury warrants, one for \$380 (20 per cent. thereof), made payable to Calhoun, the other for \$1,520 (80 per cent. thereof), made payable to Massie. Calhoun demanded of Massie a further sum of \$570, equal to 30 per cent. of the claim. Payment was refused; and he brought this suit in a state court of Virginia to recover the amount, claiming that the warrant for 20 per cent. had been accepted by him without waiving or releasing his right under the contract to the balance. A declaration setting forth in substance the above facts was demurred to on the ground that recovery was prohibited by section 4 of the act under which the appropriation was made. The demurrer was sustained and judgment entered thereon was affirmed by the Supreme Court of Appeals of the State of Virginia (123 Va. 673, 97 S. E. 576). The case comes here on writ of certiorari (249 U. S. 596, 39 Sup. Ct. 289, 63 L. Ed. 794); Calhoun having contended in both lower courts, as here, that section 4 deprives him of liberty and property guaranteed by the Fifth Amendment to

the federal Constitution, and hence is void.

For nearly three-quarters of a century Congress has undertaken to control in some measure the conditions under which claims against the government may be prosecuted. Its purpose has been in part to protect just claimants from extortion or improvident bargains and in part to protect the treasury from frauds and imposition. See *United States v. Van Leuvan* (D. C.) 62 Fed. 52, 56. While recognizing the common need for the services of agents and attorneys in the presentation of such claims and that parties

\*174

would often be denied the opportunity of securing such services if contingent fees were prohibited (*Taylor v. Bemiss*, 110 U. S. 42, 45, 3 Sup. Ct. 441, 28 L. Ed. 64) Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment from time to time of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services<sup>2</sup> Congress has sought both to prevent the stirring up of unjust claims against the government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled. *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314, 336, 14 L.

\*175

Ed. 953; *United States v. Hall*, 98 U. S. 343, 354, 555, 25 L. Ed. 180; *Ball v. Halsell*, 161

<sup>2</sup> Assignment of Claims against the United States: Act July 29, 1846, c. 66, 9 Stat. 41; Act Feb. 26, 1853, c. 81, § 1, 10 Stat. 170; Rev. Stat. 3477 (Comp. St. § 6383). Repayment of moneys collected by direct tax: Act March 2, 1891, c. 496, § 3, 26 Stat. 822. Indian depredation claims: Act March 3, 1891, c. 538, § 9, 26 Stat. 851, 854. Pensions: R. S. § 4785 (Act July 8, 1870, c. 225, § 7, 16 Stat. 193, 194, as amended by Act July 4, 1884, c. 181, § 3, 23 Stat. 98, 99 [Comp. St. §§ 9112, 9115]); R. S. § 5485 (Act March 3, 1873, c. 234, §§ 31, 32, 17 Stat. 566, 575 [Comp. St. § 9114]); R. S. § 4711 (Act March 3, 1873, c. 234, § 17, 17 Stat. 566, 572 [Comp. St. § 8999]); Act Jan. 25, 1879, c. 23, § 4, 20 Stat. 265 (Comp. St. § 9113); Act June 27, 1890, c. 634, § 4, 26 Stat. 182, 183 (Comp. St. § 8938); Act March 3, 1891, c. 542, 26 Stat. 948, 979; Act March 3, 1891, c. 548, 26 Stat. 1081, 1082; Act Aug. 5, 1892, c. 379, § 2, 27 Stat. 348, 349 (Comp. St. § 9071); Act Feb. 28, 1903, c. 858, § 3, 32 Stat. 920, 921 (Comp. St. § 8995); Act April 19, 1908, c. 147, § 3, 35 Stat. 64 (Comp. St. § 8985); Act May 28, 1908, c. 208, 35 Stat. 418, 419; Act Sept. 8, 1916, c. 470, § 4, 39 Stat. 844, 845 (Comp. St. § 8931d); Act July 16, 1918, c. 153, § 2, 40 Stat. 903, 904 (Comp. St. Ann. Supp. 1919, § 8985b). Pay and bounty of colored soldiers: Act March 3, 1873, c. 182, § 2, 20 Stat. 377, 402 (Comp. St. § 3969). Arrears of pay or allowances in connection with services in the Civil War: Act Dec. 22, 1911, c. 6, 37 Stat. 47, 49 (Comp. St. § 2204). Mississippi Choctaws: Act May 31, 1900, c. 598, 31 Stat. 221, 237. Services for Indians: Rev. Stat. § 2104 (Comp. St. § 4088); Act June 30, 1913, c. 4, § 17, 38 Stat. 77, 95; Act Aug. 1, 1914, c. 222, § 17, 38 Stat. 582, 599. Claims under War Risk Insurance Act: Act June 12, 1917, c. 26, § 8, 40 Stat. 102, 104 (Comp. St. 1918, Comp. St. Ann. Supp. 1918, § 514ee).



U. S. 72, 82, 84, 16 Sup. Ct. 554, 40 L. Ed. 622.

[1-3] The provision in the contract sued on purporting to give a lien upon any warrant issued was void under section 3477 of the Revised Statutes (Comp. St. § 6383). *Nutt v. Knut*, 200 U. S. 12, 20, 26 Sup. Ct. 216, 50 L. Ed. 348. It is urged that the act here in question should be construed as limiting only the proportion of the specific funds received from the government which may be applied to payment of attorney's fees; but the second paragraph of the law leaves no room for construction. It provides that:

"It shall be unlawful for any \* \* \* attorney \* \* \* to \* \* \* receive any sum which in the aggregate exceeds twenty per centum" of the claim.

Calhoun contends, however, that if the act is construed as limiting the amount recoverable from a claimant upon his personal obligation, it is void as applied to contracts in existence at the time of its passage, at least where, as here, the services contemplated had then been substantially performed.

That an act limiting the compensation of attorneys in the prosecution of claims against the government is valid also as to contracts which had been entered into before its passage was expressly held in *Ball v. Halsell*, supra. The act there in question was passed 17 years after the date of the contract, and the attorney had performed important services before its enactment. Here, it is said, substantially all the services required of Calhoun had been performed when the act was passed. The difference in the percentage of services performed cannot here affect the legal result. An appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose restrictions upon property which produce like results. *Lottery Case*, 188 U. S. 321, 357, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58, 31 Sup. Ct. 364, 55

\*176

L. Ed. 364; *Hoke v. United States*, 227 U. S. 308, 323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. —. The sovereign right of the government is not less because the property affected happens to be a contract. *Louisville & Nashville Railroad Co. v. Mottley*, 219 U. S. 467, 484, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309. Here, unlike *New York Central v. Gray*, 239 U. S. 583, 587, 36 Sup. Ct. 176, 60 L. Ed. 451, a performance of a substitute for the obligation undertaken and later prohibited by the

statute is impossible, because the act forbids the collection or receipt of any compensation in excess of 20 per cent.

In the case at bar there are special reasons why the contract cannot prevail over the statute enacted later. At the time when the contract was entered into there was no legislation, general or special, which conferred upon Massie any right of recovery even if he should establish to the satisfaction of Congress that his claim was equitable. A statute making an appropriation to pay the claim was thus a condition precedent to liability on the part of Massie to Calhoun; and the thing contracted for was Calhoun's aid in securing its enactment. The aid was to be given by representing Massie before the Court of Claims. But both of the parties knew that, although Calhoun might have success before the Court of Claims, Congress would still be free to refuse both to recognize the claim as an equitable one and to make an appropriation for its payment. They also knew that, if it concluded to grant relief, Congress was free to do so upon such conditions as it deemed proper. Compare *Ball v. Halsell*, supra, 161 U. S. 82, 84, 16 Sup. Ct. 554, 40 L. Ed. 622; *Kendall v. United States*, 7 Wall. 113, 117, 19 L. Ed. 85. In view of the past action of Congress limiting attorney's fees, referred to above, it was at least conceivable when the contract was made that Congress might, as it proved,<sup>a</sup> be unwilling to enact any legislation without assuring itself that the benefits thereof

\*177

would not inure largely to others than those named in the act. Assent by Calhoun to the insertion in the act of a condition such as this, which he might reasonably have contemplated would be required to insure its passage, was therefore, implied in the contract to aid in securing the legislation. Compare *The Kronprinzessin Cecilie*, 244 U. S. 12, 22, 23, 37 Sup. Ct. 490, 61 L. Ed. 960.

[4] Furthermore, Calhoun accepted and received from the treasury a warrant for 20 per cent. of the sum appropriated. The money was paid and it was received under the act which provided that it was unlawful to collect any sum in excess of 20 per cent., "any contract to the contrary notwithstanding." Calhoun cannot take under the act and repudiate its provisions. Compare *Shepard v. Barron*, 194 U. S. 553, 567, 24 Sup. Ct. 737, 48 L. Ed. 1115; *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 29, 24 Sup. Ct. 310, 48 L. Ed. 598; *Interstate Railway Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. The allegation in the declaration that he accepted the 20 per cent. "without waiving or releasing any of his rights under the aforesaid contract" was doubtless intended as a statement that the amount collected from the government was not accepted as a full set-

<sup>a</sup> See 51 Cong. Rec. p. 324; 52 Cong. Rec. 5289, 5316.

tlement of his rights against the defendant under the contract. But it was a protestation totally at variance with his conduct. The payment to him by the treasury of the 20 per cent. could be made only under the act. It must be held to have been accepted according to the terms of the act. Any reservation which he may have made in words was futile. *Capital Trust Co. v. Calhoun*, 250 U. S. 208, 218, 219, 39 Sup. Ct. 486, 63 L. Ed. 942.

Affirmed.

Mr. Justice McREYNOLDS, dissenting.

In 1911 Calhoun made a lawful agreement with Massie to prosecute the latter's claim

against the United States \*for property taken during the Civil War (*Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64); and Massie expressly bound himself to pay, as a fee for such services, "a sum equal to 50 per cent. of the amount which may be collected, said fee to be a lien on any warrant," etc.

Calhoun performed his full part in strict accordance with the contract. As a result of his proper efforts, Congress finally approved the claim and appropriated \$1,900 to pay it. Act March 4, 1915, c. 140, 38 Stat. 962, 989.

But the same act (section 4, p. 996) provided that not more than 20 per cent. of the amount appropriated should be paid, or delivered to, or received by, any attorney for services, etc.; also:

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

*Capital Trust Co. v. Calhoun*, 250 U. S. 208, 39 Sup. Ct. 486, 63 L. Ed. 942, affirms the power of Congress to exempt the appropriated fund from any demand for counsel fees.

In that case Calhoun, relying upon a contract like the one presently before us, recovered a judgment in the state court for the difference between 20 per cent. received from the treasury and fifty per cent. of the appropriation. The matter came here, and we expressly declared (250 U. S. 216, 39 Sup. Ct. 488, 63 L. Ed. 492):

"If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States, but from other assets of the estate, a situation is presented which it was said in *Nutt v. Knut*, 200 U. S. 12, 21, would not encounter legal objection. In other words, the

limitation \*in the act appropriating the money to 20 per cent. as the amount to be paid to an agent or attorney would have no application or be involved."

In effect, the court now holds that statement was obviously erroneous, and that Calhoun would have committed a misdemeanor if he had accepted a fee exceeding the 20 per cent.

As to Certain "Special Reasons Why the Contract Cannot Prevail Over the Statute Enacted Later."

(1) It is said that, when he executed the contract of employment, Calhoun impliedly assented to the insertion in any future appropriation act of a condition like the one under consideration; therefore he cannot recover. This assumes: First, a construction of the act in direct conflict with the meaning heretofore attributed to it; and, second, that so construed it is within the power of Congress. If these two assumptions are correct, of course there is no right to recover. This special reason can only serve to mislead.

(2) It is further said that, as Calhoun received 20 per cent. of the amount appropriated by an act which declared unlawful the collection of anything more, he thereby in effect estopped himself from making a personal demand against his client. But this again assumes a construction of the act contrary to what we have declared, and further assumes that so construed it is valid. If these assumptions are correct, no further discussion is needed. This special reason lacks substance and can serve no good purpose.

#### The Meaning of Section 4.

Considering the definite statement concerning the true meaning of this section made 12 months ago in *Capital Trust Co. v. Calhoun*, 250 U. S. 208, 39 Sup. Ct. 486, 63 L. Ed. 942, and quoted above, it would seem at least unusual now to announce a wholly different view accompanied by the mere assertion that there is "no room for construction."

\*180

No mention \*is made of what was then said in very plain terms. Of course this has been accepted as authoritative both by lawyers and courts. The result is necessarily injurious both to the court and the public.

In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408, 29 Sup. Ct. 527, 536 (53 L. Ed. 836) this was said:

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

As that statement has been repeated several times, it would seem worthy of some consideration now.

I presume nobody doubts that Congress has power to prescribe reasonable rules concerning champerty, maintenance or kindred matters in United States courts, and to regulate assignments of claims against the government. But, under the adopted construction,



section 4 (Act March 4, 1915) destroys an entirely lawful contract made long before its passage, deprives counsel of his right to enforce the personal liability of his client to pay for services already performed, and renders criminal the acceptance by him of more than an arbitrarily specified amount.

Marshall v. Baltimore & Ohio R. R. Co., 16 How. 314, 316, 14 L. Ed. 953, United States v. Hall, 98 U. S. 343, 354, 355, 25 L. Ed. 180, and Ball v. Halsell, 161 U. S. 72, 84, 16 Sup. Ct. 554, 40 L. Ed. 622, are referred to as authority for such oppressive legislation. They give it no support.

Marshall v. Baltimore & Ohio R. R. Co. was an attempt to collect compensation for lobbying; and the holding was that a contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the Legislature of a state, and the other party promises to pay a large sum of money in case the law should pass. The case appears unimportant in connection with this controversy.

In United States v. Hall the court ruled Congress has power to declare that embezzle-

\*181

ment or fraudulent conversion to his own use by a guardian of pension money received on behalf of his ward from the Government is an offense against the United States. This case might be relevant if Calhoun were seeking to reach the fund appropriated by Congress; but he is not.

In Ball v. Halsell, 161 U. S. 82, 16 Sup. Ct. 556, 40 L. Ed. 622, an attorney sought to recover under a written agreement, concerning which this court said:

"The instrument was an unilateral contract, not signed by the attorney, nor containing any agreement on his part, and—so long, at least, as it had not been carried into execution—might be revoked by the principal, or might be disregarded by him in making a settlement with the United States, or might be treated by him as absolutely null and void in any contest between him and the attorney. \* \* \* By the very terms of the contract, the attorney was to be paid only out of money recovered and received by him from the United States."

The case is wholly unlike the one now before us. Mr. Justice Gray took pains to explain the difference between it and Davis v. Commonwealth, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743, where the Massachusetts court ruled that an agent of the state employed to prosecute a claim against the United States could recover compensation notwithstanding the act of Congress appropriating money to meet the claim provided that no part of such sum should be paid by the state to any attorney under previous contract.

Davis v. Commonwealth and the language

by Mr. Justice Gray in Ball v. Halsell, wherein he pointed out the clear distinction between the two cases, ought not to be lightly disregarded.

It is certainly a very serious thing to decide that Congress, by its arbitrary fiat, may wholly deprive counsel of the right to enforce payment of compensation for long-continued efforts theretofore lawfully put forth, and prevent him, indeed, from accepting anything therefor. If a limit may be set at 20 per

\*182

cent., any payment may \*be proscribed. We should follow Capital Trust Co. v. Calhoun, and reverse the judgment below.

The Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power. It declares no person shall be deprived of life, liberty or property without due process of law; and this inhibition protects every man in his right to engage in honest and useful work for compensation. Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973.

Mr. Justice McKENNA, Mr. Justice VAN DEVANTER, and Mr. Justice PITNEY concur in this dissent.

(253 U. S. 182)

NEWMAN et al. v. MOYERS et al.

(Argued March 11, 1920. Decided May 17, 1920.)

No. 85.

1. UNITED STATES 94—STATUTE LIMITING COMPENSATION OF ATTORNEYS FOR CLAIMANTS IS VALID.

Omnibus Claims Act March 4, 1915, § 4, limiting the compensation of attorneys for claimants in payment of whose claims appropriations are therein made to 20 per cent. of the amount appropriated, is valid.

2. APPEAL AND ERROR 1169(1)—JUDGMENT IN SUIT FOR ILLEGAL PURPOSE REVERSIBLE REGARDLESS OF INTEREST OF APPEALING DEFENDANTS.

Under Omnibus Claims Act March 4, 1915, § 4, limiting the compensation of attorneys for claimants, where attorneys for a claimant sued the claimant and the treasury officials to compel payment from the amount appropriated of a greater percentage than that provided by the statute, plaintiffs were seeking to recover moneys which they were prohibited by statute from receiving, and the overruling of a motion by the treasury officials to dismiss the bill was error for which the judgment must be reversed, whether or not they or the government have any interest entitling them to appeal.

**3. APPEAL AND ERROR ¶784, 1125—REMEDIES WHEN JOINT APPELLANT DOES NOT PERFECT APPEAL STATED.**

Where one of several joint appellants fails to perfect his appeal, the appellee may have appellant called and dismiss the appeal or open the record and pray for an affirmance.

**4. APPEAL AND ERROR ¶1159—COURT ON ITS OWN MOTION MAY OPEN RECORD AND REVERSE, THOUGH APPELLANT DOES NOT PERFECT APPEAL.**

Though one of several joint appellants failed to appear in the Supreme Court, and took no part in the proceedings, the court may on its own motion open the record, and, if it perceives that the suit is for an illegal purpose, reverse the decree and remand, with instructions to dismiss the bill.

**5. APPEAL AND ERROR ¶803—DISMISSAL FOR WANT OF PROSECUTION LEAVES CASE AS BEFORE APPEAL.**

A dismissal for want of prosecution remands the case to the lower court in the same condition as before the appeal was taken.

Appeal from the Court of Appeals of the District of Columbia.

Suit by Ida M. Moyers and another, partners, trading as Moyers & Consaul, against Ursula Ragland Erskine, and others, in which Sue Erskine Newman, administratrix of the defendant named, was made a defendant. A decree for plaintiff was affirmed by the Court of Appeals of the District of Columbia (47 App. D. C. 102, Ann. Cas. 1918E, 528), and defendants appeal. Appeal by the administratrix dismissed for want of prosecution, and case remanded; and decree reversed as to the other defendants, and cause remanded, with directions.

\*183

\*Mr. Assistant Attorney General Frierson, for appellants.

Mr. Charles F. Consaul, of Washington, D. C., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

By Omnibus Claims Act March 4, 1915, c. 140, 38 Stat. 962, 963, discussed in *Calhoun v. Massie*, 253 U. S. 170, 40 Sup. Ct. 474, 64 L. Ed. —, decided this day, Ursula Ragland Erskine became entitled to receive from the Secretary of the Treasury the sum of \$1,836.66. Long before that date she and the firm of Moyers & Consaul, attorneys, had entered into a contract for the prosecution of her claim against the government. The contract provided that the attorneys should receive an amount equal to 50 per cent. of the sum collected. Its terms and the services rendered were, in substance, identical with those set forth in *Calhoun v. Massie*. In reliance upon section 4 of the above act, Mrs. Erskine refused to pay or assent to the payment to the attorneys of an amount greater than 20 per cent. of the appropriation; and the treasury officials were proposing to issue a warrant

\*184

for 20 per cent. thereof to the attorneys and another for the balance to her. Moyers & Consaul insisted that the provision of the act limiting fees of attorneys to 20 per cent. was invalid; and they brought this suit in the Supreme Court of the District of Columbia against Mrs. Erskine, the Secretary of the Treasury, and the Treasurer of the United States to recover the full 50 per cent. As in *McGowan v. Parish*, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955, the plaintiffs prayed that they be declared entitled to recover from Mrs. Erskine the amount claimed; that the issuance to and the collection by her of any amount from the government be enjoined; and that either the whole amount be paid into the registry of the court, or that a receiver be appointed who should collect from the government the whole amount and pay therefrom to plaintiffs an amount equal to 50 per cent. of the collection. Mrs. Erskine died soon after the filing of the bill, whereupon Sue Erskine Newman, the administratrix of her estate, was made defendant.

The Secretary of the Treasury and the Treasurer moved to dismiss the bill of complaint, among other reasons, on the ground that collection of more than 20 per cent. was prohibited by section 4, and that the limitation thereby imposed was a valid exercise of congressional power. Sue Erskine Newman, as administratrix, moved to dismiss on the same ground, among others. The motions were overruled; and the court entered a decree directing payment of the money into court, ordering that plaintiff recover from the administratrix an amount equal to 50 per cent. of the collection from the government, and directing that this sum be paid out of the funds to be so paid into court. From the decree for plaintiffs entered by the Supreme Court of the District of Columbia, all the defendants appealed to the Court of Appeals for the District of Columbia; and when the latter affirmed the decree of the lower court, all the defendants joined in the

\*185

appeal to this court. The Honorable Carter Glass, upon becoming Secretary of the Treasury, was substituted for the Honorable William G. McAdoo; and the further substitution of the Honorable David F. Houston was made when he became Secretary of the Treasury. The appellees now move to dismiss the appeals of the Secretary of the Treasury and the Treasurer of the United States on the ground that neither they nor the government have any pecuniary or other interest in the suit. They also move to dismiss the appeal of the administratrix on the ground that she did not formally enter her appearance in this court nor take any part in the proceedings here.

[1, 2] The merits of the former motion we have no occasion to consider, for the follow-



ing reason: Section 4 of the act limited the compensation which the attorneys may collect or receive to 20 per cent. The act is valid. *Capital Trust Co. v. Calhoun*, 250 U. S. 208, 39 Sup. Ct. 486, 63 L. Ed. 942; *Calhoun v. Massie*, supra. The plaintiffs were seeking the aid of the courts to recover moneys which an act of Congress prohibited them from collecting or receiving. If the bill had not alleged that this act was invalid, it would have been the duty of the lower court to dismiss the bill even if none of the defendants had raised any objection to the maintenance of the suit. *Oscanyan v. Arms Co.*, 103 U. S. 261, 267, 26 L. Ed. 539; *Lee v. Johnson*, 116 U. S. 48, 52, 6 Sup. Ct. 249, 29 L. Ed. 570; *Coppell v. Hall*, 7 Wall. 542, 558, 19 L. Ed. 244. The Secretary of the Treasury and the Treasurer of the United States did make such objection. The overruling of it in the courts below was error. The judgment must be reversed, and the cause remanded, with directions to dismiss the bill as to them.

[3] The fact that the administratrix did not persist in her appeal should not result in affirmance of the judgment as to her. In *Montalet v. Murray*, 3 Cranch, 249, 2 L. Ed. 429, Mr. Chief Justice Marshall "stated the practice of the court to be that, where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called,

and \*dismiss the writ of error, or may open the record, and pray for an affirmance." This practice is still in force under rules 9 and 16 of this court (32 Sup. Ct. vii, ix). *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054; *Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008; *The S. S. Osborne*, 105 U. S. 447, 450, 451, 26 L. Ed. 1065. It is applicable to one of several joint appellants who fails to perfect his

appeal. *Yates v. Jones National Bank*, 206 U. S. 158, 166, 181, 27 Sup. Ct. 638, 51 L. Ed. 1002.

[4, 5] If the appellee had asked for an affirmance it is clear that it must have been denied because of the illegal purpose of the suit. But the court might go further. Since of its own motion it might dismiss this appeal (*Hilton v. Dickinson*, 108 U. S. 165, 168, 2 Sup. Ct. 424, 27 L. Ed. 688), and since on dismissing it a mandate to the lower court might issue (*United States v. Gomez*, 23 How. 326, 330, 16 L. Ed. 552), this court might also of its own motion entertain the alternative to dismissal spoken of by Mr. Chief Justice Marshall—i. e., open the record. If it did so and perceived that the court was being used to attain an illegal result, there would be power to reverse the decree and remand the cause, with instructions to dismiss the bill. But in the present case such a course is not necessary. The appellees have asked, not for an affirmance, but for a dismissal, of the appeal of the administratrix. A dismissal for want of prosecution will remit the case to the lower court in the same condition as before the appeal was taken; and the lower court will then be free to take appropriate action to prevent itself from being used as an instrument in illegality. *United States v. Pacheco*, 20 How. 261, 15 L. Ed. 390; *United States v. Gomez*, 23 How. 326, 339-340, 16 L. Ed. 552.

Decree reversed as to appellants *Houston* and *Burke*, and cause remanded, with directions to dismiss the bill as to them.

Appeal of *Newman*, administratrix, dismissed for want of prosecution, and case remanded for further proceedings in conformity with this opinion.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(252 U. S. 588)

No. 237. *THE GLOBE WORKS*, appellant, v. *THE UNITED STATES*. March 11, 1920. Appeal from the Court of Claims. For opinion below, see 53 Ct. Cl. 532. Mr. John S. Blair, of Washington, D. C., for appellant. Mr. Assistant Attorney General Davis, for the United States. Dismissed, pursuant to the sixteenth rule (32 Sup. Ct. ix), on motion of Mr. Assistant Attorney General Davis for the appellee.

(252 U. S. 589)

No. 267. *E. B. HOWARD*, State Auditor of the State of Oklahoma, appellant, v. *H. V. FOSTER et al.*, etc. March 19, 1920. Appeal from the District Court of the United States

for the Western District of Oklahoma. Messrs. S. P. Freeling and John B. Harrison, both of Oklahoma City, Okl., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(251 U. S. 547)

No. —. *KOSTA KISIN*, petitioner, v. *THE STATE OF CALIFORNIA*. March 1, 1920. On petition for a writ of certiorari to the Superior Court of the State of California in and for the County of Contra Costa.

PER CURIAM. The motion for leave to proceed in forma pauperis in this case and that the clerk of this court be directed to file the petition for a writ of certiorari herein is denied.

(251 U. S. 546)

No. —, original. *Ex parte*; In the matter of the UNITED STATES, petitioner. March 1, 1920. Motion for leave to file petition for writs of mandamus and prohibition denied.

(253 U. S. 473)

No. —, original. *Ex parte* In the matter of James J. O'BRIEN, petitioner. April 26, 1920. Motion for leave to file petition for writ of mandamus or prohibition denied.

No. —. Alice HOLBERT and John H. Holbert, plaintiffs in error, v. Ed R. PATRICK and Mrs. T. C. Galbraith. April 26, 1920. Motion for leave to proceed in forma pauperis denied.

(253 U. S. 473)

No. 493. CITY TRUST COMPANY, plaintiff in error, v. BANKERS MORTGAGE LOAN COMPANY. April 26, 1920. In error to the Supreme Court of the State of Nebraska. See, also, 102 Neb. 532, 167 N. W. 785. Mr. Sylvester R. Rush, of Omaha, Neb., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(253 U. S. 484)

No. 615. David G. WINE, petitioner, v. The UNITED STATES of America. April 26, 1920. For opinion below, see 260 Fed. 911. Messrs. C. C. Flansburg and T. J. Doyle, both of Lincoln, Neb., for petitioner. Mr. T. S. Allen, of Lincoln, Neb., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(253 U. S. 484)

No. 767. The STATE OF LOUISIANA, petitioner, v. WILLIAM T. JOYCE COMPANY et al. April 26, 1920. For opinion below, see 261 Fed. 128. Mr. Mathew J. Allen, Dist. Atty., of Amite, La. (Messrs. Wm. Winans Wall, of New Orleans, La., and Bolivar E. Kemp, of Amite, La., of counsel), for the State of Louisiana. Messrs. Robert R. Reid, of Amite, La., and Henry Fitts, of Chicago, Ill. (Messrs. Barthell, Fitts & Rundall, of Chicago, Ill., and R. C. & S. Reid, of Amite, La., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 484)

No. 782. Herman BLOCH, petitioner, v. The UNITED STATES of America. April 26, 1920. For opinion below, see 261 Fed. 321. Messrs. C. B. Hudspeth, Geo. E. Wallace, and A. J. Harper, all of El Paso, Tex., and St. Clair Adams, of New Orleans, La., for plaintiff in error. Mr. Robert P. Stewart, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

40 SUP. CT.—31

(253 U. S. 484)

No. 786. E. A. KING (and those who wish also to intervene for their benefit), petitioner, v. Robert H. BARR et al. April 26, 1920. For opinion below, see 262 Fed. 56. Mr. William C. Bristol, of Portland, Or. (Mr. Levi Cooke, of Washington, D. C., of counsel), for petitioner. Messrs. C. E. S. Wood, of Portland, Or., Eugene A. Cox, of Lewiston, Idaho, and Wood, Montague & Matthiessen, of Portland, Or., for respondents. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(253 U. S. 485)

No. 797. CUYAMEL FRUIT COMPANY, petitioner, v. JOHNSON IRON WORKS, Limited. April 26, 1920. For opinion below, see 262 Fed. 387. Messrs. Walter S. Penfield, of Washington, D. C., and Solomon Wolff, of New Orleans, La., for petitioner. Messrs. Joseph W. Montgomery and Hall, Monroe & Lemann, all of New Orleans, La., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 485)

No. 798. GERHARDT WESSELS, petitioner, v. The UNITED STATES of America. April 26, 1920. For opinion below, see 262 Fed. 389. Mr. R. H. Ward, of Wichita Falls, Tex., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 485)

No. 800. DUNKLEY COMPANY and Michigan Canning & Machinery Company, petitioners, v. PASADENA CANNING COMPANY and George E. Grier. April 26, 1920. For opinion below, see 261 Fed. 386. Messrs. Fred L. Chappell, of Kalamazoo, Mich., and Drury W. Cooper, of New York City, for petitioners. Messrs. Kemper B. Campbell, Francis J. Heney, Frederick S. Lyon, and William J. Carr, all of Los Angeles, Cal., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(253 U. S. 478)

No. 802. The NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, plaintiff in error, v. YORK & WHITNEY COMPANY. April 26, 1920. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts granted.

(253 U. S. 478)

No. 803. YORK & WHITNEY COMPANY, plaintiff in error, v. The NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. April 26, 1920. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts granted.

(253 U. S. 479)

No. 805. The DISTRICT OF COLUMBIA, petitioner, v. R. P. ANDREWS PAPER COMPANY. April 26, 1920. For opinion below,



see 263 Fed. 1017. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(253 U. S. 479)

No. 806. The DISTRICT OF COLUMBIA, petitioner, v. SAKS & COMPANY. April 26, 1920. For opinion below, see 263 Fed. 1020. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(253 U. S. 479)

No. 807. The DISTRICT OF COLUMBIA, petitioner, v. Abraham LISNER. April 26, 1920. For opinion below, see 263 Fed. 1020. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(253 U. S. 485)

No. 812. Herman THEDEN and Anna Theden, petitioners, v. The UNION PACIFIC RAILROAD COMPANY. April 26, 1920. For opinions below, see 106 Kan. 40, 186 Pac. 752; 104 Kan. 289, 178 Pac. 441. Messrs. L. W. Keplinger, of Kansas City, Kan. (C. W. Trickett, of Kansas City, Kan., of counsel), for petitioners. Messrs. N. H. Loomis, of Omaha, Neb., and R. W. Blair and T. M. Lillard, both of Topeka, Kan., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(253 U. S. 485)

No. 816. Albert F. HOUGHTON et al., petitioners, v. Eugene F. ENSLEN et al. April 26, 1920. For opinion below, see 261 Fed. 113. Messrs. Z. T. Rudolph and James A. Mitchell, both of Birmingham, Ala., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 479)

No. 817. Anna LANG, as administratrix, etc., petitioner, v. NEW YORK CENTRAL RAILROAD COMPANY. April 26, 1920. For opinion below, see 227 N. Y. 507, 125 N. E. 681, which reversed 187 App. Div. 967, 175 N. Y. Supp. 908, which affirmed 104 Misc. Rep. 634, 172 N. Y. Supp. 196. Petition for a writ of certiorari to the Supreme Court of the State of New York granted.

(253 U. S. 482)

No. 818. LEHIGH VALLEY RAILROAD COMPANY, petitioner, v. Frederick W. HOWELL et al., as firm of B. H. Howell, Son & Company, et al. April 26, 1920. For opinion below, see 109 Atl. 309. Messrs. Lindley M. Garrison, Edgar H. Boles, and Richard W. Barrett, all of New York City, and Geo. S. Hobart, of Jersey City, N. J., for petitioner. Messrs. Pitney, Hardin & Skinner, of Newark, N. J., and Butler, Wyckoff & Campbell, of New York City (Messrs. Alfred F. Skinner, of Newark, N. J., and Frederick B. Campbell, Paul C. Whipp, and Thomas R. Rutler, all of New York City, of counsel), for respondents. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.

(253 U. S. 483)

Nos. 819 to 830. LEHIGH VALLEY RAILROAD COMPANY, petitioner, v. ROYAL INDEMNITY COMPANY and others. April 26, 1920. For opinion below, see 109 Atl. 745. Messrs. Lindley M. Garrison, Edgar H. Boles, and Richard W. Barrett, all of New York City, and Geo. S. Hobart, of Jersey City, N. J., for petitioner. Petition for writs of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.

(253 U. S. 479)

No. 831. Archie J. McLAREN, administrator, etc., petitioner, v. L. G. FLEISCHER. April 26, 1920. For opinion below, see 185 Pac. 967. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

(253 U. S. 480)

No. 832. Robert L. CULPEPPER, petitioner, v. James M. OCHELTREE. April 26, 1920. For opinion below, see 185 Pac. 971. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

(253 U. S. 480)

No. 833. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. S. B. POSTON. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted.

(253 U. S. 480)

No. 842. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. Maria Domenica DI DONATO. April 26, 1920. For opinion below, see 109 Atl. 627. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted.

(253 U. S. 486)

No. 843. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. Annie REYNOLDS. April 26, 1920. For opinion below, see 109 Atl. 660. Mr. George Gowen Parry, of Philadelphia, Pa., for petitioner. Mr. Francis M. McAdams, of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(253 U. S. 480)

No. 844. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. Marie E. POLK. April 26, 1920. For opinion below, see 109 Atl. 627. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted.

(253 U. S. 499)

No. 846. INTER-URBAN RAILWAY COMPANY and London Guarantee & Accident Company, petitioners, v. Mrs. Fred SMITH. April 26, 1920. On petition for writ of certiorari to the Supreme Court of the State of Iowa. See, also, 171 N. W. 134. Dismissed on motion of counsel for the petitioners.

(253 U. S. 486)

No. 852. FREEMAN-SWEET COMPANY, petitioner, v. LUMINOUS UNIT COMPANY. April 26, 1920. For opinion below, see 264

Fed. 107. Mr. Paul Bakewell, of St. Louis, Mo., for petitioner. Messrs. Dodson & Roe, of Chicago, Ill. (Harry Lea Dodson, of Chicago, Ill., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(253 U. S. 486)

No. 856. D. W. RYAN TOWBOAT COMPANY (Inc.), petitioner, v. Carrie S. DRAPER et al. April 26, 1920. For opinion below, see 263 Fed. 31. Mr. John Charles Harris, of Galveston, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 486)

No. 857. BOWERS SOUTHERN DREDGING COMPANY, petitioner, v. Carrie S. DRAPER et al. April 26, 1920. For opinion below, see 263 Fed. 31. Messrs. John Neethe and J. W. Terry, both of Galveston, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 499)

No. 625. Lillian B. PEMBLETON, petitioner, v. ILLINOIS COMMERCIAL MEN'S ASSOCIATION. April 29, 1920. On writ of certiorari to the Supreme Court of the State of Illinois. For opinion below, see 289 Ill. 99. 124 N. E. 355. Dismissed with costs, on motion of counsel for the petitioner.

(253 U. S. 486)

No. 781. Thomas D. THOMAS, petitioner, v. SOUTH BUTTE MINING COMPANY. May 3, 1920. For opinion below, see 260 Fed. 814. Messrs. Charles A. Beardsley and Fry & Wood, all of Oakland, Cal., for petitioner. Mr. John A. Shelton, of Butte, Mont., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(253 U. S. 481)

No. 789. WEBER ELECTRIC COMPANY, petitioner, v. E. H. FREEMAN ELECTRIC COMPANY. May 3, 1920. For opinion below, see 262 Fed. 769. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(253 U. S. 481)

No. 841. The UNITED STATES of America, petitioner, v. AETNA EXPLOSIVES COMPANY. May 3, 1920. Petition for a writ of certiorari to the United States Court of Customs Appeals granted.

(253 U. S. 487)

No. 845. Ephraim LEDERER, collector of internal revenue, petitioner, v. NORTHERN TRUST COMPANY and Henry R. Zesinger, executors, etc. May 3, 1920. For opinion below, see 262 Fed. 52. Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., and William L. Friereson, Asst. Atty. Gen., for petitioner. Messrs. Wm. Henry Snyder and Wm. M. Stewart, Jr., both of Philadelphia, Pa., for respondents. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Third Circuit denied.

(253 U. S. 481)

No. 847. MICHIGAN CENTRAL RAILROAD COMPANY, petitioner, v. MARK OWEN & COMPANY. May 3, 1920. For opinion below, see 291 Ill. 149, 125 N. E. 767. Petition for a writ of certiorari to the Supreme Court of the State of Illinois granted.

(253 U. S. 487)

No. 853. C. T. DOREMUS, petitioner, v. The UNITED STATES of America. May 3, 1920. For opinion below, see 262 Fed. 849. Messrs. C. A. Davies, of San Antonio, Tex., R. L. Neal, of Waco, Tex., and Ed. Haltom, of San Antonio, Tex., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 487)

No. 875. Grace McMillan GIBSON, petitioner, v. Ethel M. GERNAT. May 3, 1920. Messrs. Frederic D. McKenney, John Spalding Flannery, and G. Bowdoin Craighill, all of Washington, D. C., for petitioner. Messrs. Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 1. The UNITED STATES of America, appellant, v. LEHIGH VALLEY RAILROAD COMPANY. May 17, 1920. See, also, 38 Sup. Ct. 580. The Attorney General, for the United States. Messrs. John G. Johnson, of Oneonta, N. Y., Edgar H. Boles, of New York City, Everett Warren, of Scranton, Pa., John Hampton Barnes, of Philadelphia, Pa., Allan McCulloch and Elihu Root, Jr., both of New York City, Frank W. Wheaton, of Wilkes-Barre, Pa., and Nicholas W. Hacker, of New York City, for respondent. Ordered that this case be restored to the docket for oral argument.

No. 34. Franklin K. LANE, Secretary of the Interior, et al., appellants, v. CENTRAL PACIFIC RAILWAY COMPANY. May 17, 1920. For opinion below, see 46 App. D. C. 374, Ann. Cas. 1918C, 1002. Messrs. Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellants. Messrs. A. A. Hoehling, Jr., and C. F. R. Ogilby, both of Washington, D. C., for respondent. Leave granted to substitute as one of the appellants John Barton Payne, present Secretary of the Interior, in the place of Franklin K. Lane, former Secretary thereof, on motion of Mr. Solicitor General King for the appellants.

No. 35. The NORTHERN PACIFIC RAILWAY COMPANY, appellant, v. Franklin K. LANE, Secretary of the Interior. May 17, 1920. For opinion below, see 46 App. D. C. 434. Messrs. Alex. Britton and F. W. Clements, both of Washington, D. C., and Charles Donnelly, of St. Paul, Minn., for appellant. Leave granted to substitute as party appellee John Barton Payne, present Secretary of the In-



terior, in the place of Franklin K. Lane, former Secretary thereof, on motion of Mr. Solicitor General King for the appellee.

(253 U. S. 473)

No. 231. Edward A. SHEDD et al., appellants, v. GUARDIAN TRUST COMPANY et al. May 17, 1920. Appeal from the District Court of the United States for the Western District of Missouri. Messrs. O. H. Dean and J. C. Rosenberger, both of Kansas City, Mo., for appellants. Messrs. Delbert J. Haff, Charles W. German, and Justin D. Bowersock, all of Kansas City, Mo., for respondents.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(253 U. S. 475)

No. 256. Samuel W. SCOTT et al., plaintiffs in error, v. Ida B. W. BOOTH. May 17, 1920. In error to the Supreme Court of the State of Missouri. For opinion below, see 276 Mo. 1, 205 S. W. 633. Messrs. J. H. Ralston, of Washington, D. C., and Robert O. McLin, O. H. Dean, and H. M. Langworthy, all of Kansas City, Mo. (Messrs. James T. Montgomery, of Sedalia, Mo., Bruce Barnett, R. B. Thomson, and R. D. Williams, all of Kansas City, Mo., of counsel), for plaintiffs in error. Messrs. J. W. Porter, of Tucumcari, N. M., and C. W. Prince, E. A. Harris, James N. Beery, all of Kansas City, Mo., and A. E. Crane, of Topeka, Kan., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Schlosser v. Hemphill*, 198 U. S. 173, 175, 25 Sup. Ct. 654, 49 L. Ed. 1000; *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; *Gray's Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 255, 37 Sup. Ct. 295, 61 L. Ed. 702; *Bruce v. Tobin*, 245 U. S. 18, 19, 38 Sup. Ct. 7, 62 L. Ed. 123.

No. 268. Bartholomew SULLIVAN et al., appellants, v. Jane KIDD. May 17, 1920. Mr. George F. Beatty, of Salina, Kan., for appellants. Messrs. O. H. Dean, H. M. Langworthy, and Roy B. Thomson, all of Kansas City, Mo., for respondent. Ordered that this case be restored to the docket for oral argument, and the clerk is directed to notify the Attorney General of the United States and the Attorney General of the State of Kansas of the pendency of this cause.

(253 U. S. 474)

No. 310. James K. PERRINE, plaintiff in error, v. The STATE OF OKLAHOMA ex rel. John EMBRY, County Attorney. May 17, 1920. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 178 Pac. 97. Mr. E. G. McAdams, of Oklahoma City, Okl., for plaintiff in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Contributors to the Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) *Southern Ry. Co. v. King*, 217 U. S. 524, 534, 30 Sup. Ct. 594, 54 L. Ed. 868; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 473, 32 Sup. Ct. 236, 56 L. Ed. 510; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 157, 39 Sup. Ct. 227, 63 L. Ed. 527; (3) *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U. S. 57, 67, 30 Sup. Ct. 663, 54 L. Ed. 930.

(253 U. S. 474)

No. 324. Robert D. KINNEY, plaintiff in error, v. PLYMOUTH ROCK SQUAB COMPANY. May 17, 1920. In error to the District Court of the United States for the District of Massachusetts. Mr. Robert D. Kinney, for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; (2) *Kinney v. Plymouth Rock Squab Company*, 236 U. S. 43, 49, 35 Sup. Ct. 236, 59 L. Ed. 457.

(253 U. S. 499)

No. 346. John S. RANDOLPH, plaintiff in error, v. The UNITED STATES of America. May 17, 1920. In error to the District Court of the United States for the Northern District of New York. Mr. Frederick A. Mohr, of Auburn, N. Y., for plaintiff in error. The Attorney General for the United States. Dismissed, on motion of counsel for the plaintiff in error.

No. 370. J. Hartley MANNERS, petitioner, v. Oliver MOROSCO. May 17, 1920. See, also, 252 U. S. 317, 40 Sup. Ct. 335, 64 L. Ed. 590. Messrs. Walter C. Noyes and David Gerber, both of New York City, and William J. Hughes, of Washington, D. C., for petitioner. Mr. Charles H. Tuttle, of New York City, for respondent. Motion to modify decree denied.

No. 412. Franklin K. LANE, Secretary of the Interior, et al., appellants, v. The STATE OF NEW MEXICO. May 17, 1920. See, also, 258 Fed. 980. The Attorney General, for plaintiffs in error. Mr. Patrick H. Loughran, of Washington, D. C., for the State of New Mexico. Leave granted to substitute as one of the appellants John Barton Payne, present Secretary of the Interior, in the place of Franklin K. Lane, former Secretary thereof, on motion of Mr. Solicitor General King for the appellants.

No. 434. The UNITED STATES of America ex rel. C. E. SYKES, plaintiff in error, v. Franklin K. LANE, Secretary of the Interior.

May 17, 1920. See, also, 258 Fed. 520. Mr. Francis W. Clements, of Washington, D. C., for plaintiff in error. Leave granted to substitute as defendant in error John Barton Payne, present Secretary of the Interior, in the place of Franklin K. Lane, former Secretary thereof, on motion of Mr. Solicitor General King for the defendant in error.

(253 U. S. 474)

No. 437. The COUNTY OF DOUGLAS, in the STATE OF NEBRASKA, plaintiff in error, v. George Warner SMITH. May 17, 1920. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 254 Fed. 244, 165 C. C. A. 532. Mr. William C. Lambert, of Omaha, Neb., for petitioner.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of (1) section 128 of the Judicial Code (Comp. St. § 1120); *Shulthis v. McDougal*, 225 U. S. 561, 568, 32 Sup. Ct. 704, 56 L. Ed. 1205; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *Louisville & Nashville R. R. Co. v. Western Union Tel. Co.*, 237 U. S. 300, 302, 35 Sup. Ct. 598, 59 L. Ed. 965; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) *Brown v. Alton Water Co.*, 222 U. S. 325, 332, 333, 32 Sup. Ct. 156, 56 L. Ed. 221; *Alaska Pacific Fisheries v. Alaska*, 249 U. S. 53, 61, 39 Sup. Ct. 208, 63 L. Ed. 474.

(253 U. S. 475)

No. 633. Fred W. WEITZEL, plaintiff in error, v. The UNITED STATES. May 17, 1920. In error to the District Court of the United States for the Eastern District of Kentucky.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Contributors to the Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) *Lamar v. United States*, 240 U. S. 60, 36 Sup. Ct. 255, 60 L. Ed. 526; *Lamar v. United States*, 241 U. S. 103, 36 Sup. Ct. 535, 60 L. Ed. 912.

(253 U. S. 487)

No. 840. Emily DE FOUR, petitioner, v. The UNITED STATES of America. May 17, 1920. For opinion below, see 260 Fed. 596. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(253 U. S. 488)

Nos. 848 and 849. The BACKSTAY MACHINE & LEATHER CO., petitioner, v. Helen WADDE HAMILTON. May 17, 1920. For opinion below, see 262 Fed. 411. Petition for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(253 U. S. 488)

No. 850. TEXAS & GULF STEAMSHIP CO., petitioner, v. Clarence PARKER et al. May 17, 1920. For opinion below, see 263 Fed. 864. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 488)

No. 860. The BECKWITH COMPANY (formerly the estate of P. D. Beckwith, Inc.), petitioner, v. MINNESOTA STOVE COMPANY. May 17, 1920. For opinion below, see 264 Fed. 337. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(253 U. S. 488)

No. 861. Jeannette W. LEE, petitioner, v. Richard C. MINOR, as trustee, etc., et al. May 17, 1920. For opinion below, see 263 Fed. 507; 260 Fed. 700. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(253 U. S. 488)

No. 865. COMMERCIAL CREDIT COMPANY et al., petitioners, v. CONTINENTAL TRUST COMPANY. May 17, 1920. For opinion below, see 263 Fed. 873. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 489)

No. 868. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, petitioner, v. Mrs. Minnie OWENS, administratrix, etc. May 17, 1920. For opinion below, see 186 Pac. 1092. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(253 U. S. 489)

No. 869. ATLANTIC COAST LINE RAILROAD COMPANY, petitioner, v. The STATE OF ALABAMA. May 17, 1920. For opinion below, see 81 South. 60. Mr. Richard V. Lindabury, of Newark, N. J., for petitioner. Mr. J. Q. Smith, Atty. Gen., and L. E. Brown, Sp. Asst. Atty. Gen., for the State of Alabama. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied.

(253 U. S. 489)

No. 873. Charles KOLLMAN, petitioner, v. The UNITED STATES. May 17, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(253 U. S. 489)

No. 888. The PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Alfred STIEDLER. May 17, 1920. For opinion below, see 109 Atl. 512. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.



(253 U. S. 350)

STATE OF RHODE ISLAND v. PALMER,  
Atty. Gen., et al.

No. 29, Original.

STATE OF NEW JERSEY v. SAME.

No. 30, Original.

DEMPSEY v. BOYNTON, U. S. Atty., et al.

No. 696.

KENTUCKY DISTILLERIES & WARE-  
HOUSE CO. v. GREGORY, U. S.

Atty., et al.

No. 752.

CHRISTIAN FEIGENSPAN v. BODINE, U.  
S. Atty., et al.

No. 788.

SAWYER, U. S. Atty., et al. v. MANITOWOC  
PRODUCTS CO.

No. 794.

ST. LOUIS BREWING ASS'N v. MOORE,  
Collector, et al.

No. 837.

(Decided June 7, 1920.)

1. CONSTITUTIONAL LAW ¶10—RESOLUTION PROPOSING AMENDMENT NEED NOT CONTAIN DECLARATION THAT IT IS REGARDED AS ESSENTIAL.

A joint resolution proposing an amendment to the Constitution need not contain an express declaration that those voting for it regard it as essential; its adoption sufficiently showing that they deem it necessary.

2. CONSTITUTIONAL LAW ¶10—"TWO-THIRDS VOTE" OF MEMBERS PRESENT CONSTITUTING QUORUM MAY ADOPT RESOLUTION PROPOSING AMENDMENT.

The "two-thirds vote" in each house, which is required in proposing an amendment to the Constitution, is a vote of two-thirds of the members present, assuming the presence of a quorum, and not a vote of two-thirds of the entire membership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Two-Thirds Vote.]

3. CONSTITUTIONAL LAW ¶10—REFERENDUM PROVISIONS CANNOT BE APPLIED TO ADOPTION OF AMENDMENT TO FEDERAL CONSTITUTION.

The referendum provisions of state Constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to that Constitution.

4. CONSTITUTIONAL LAW ¶10—PROHIBITION AMENDMENT WITHIN POWER TO AMEND CONFERRED BY CONSTITUTION.

Const. Amend. 18, prohibiting the manufacture, sale, etc., of intoxicating liquors for bev-

erage purposes, is within the power to amend reserved by article 5.

5. CONSTITUTIONAL LAW ¶10—PROHIBITION AMENDMENT HELD LAWFULLY PROPOSED AND RATIFIED.

Const. Amend. 18, prohibiting the manufacture, sale, etc., of intoxicating liquors for beverage purposes, has become, by lawful proposal and ratification, a part of the Constitution.

6. INTOXICATING LIQUORS ¶13—STATUTES AUTHORIZING WHAT PROHIBITION AMENDMENT PROHIBITS ARE INVALIDATED.

Const. Amend. 18, § 1, prohibiting the manufacture, sale, etc., of intoxicating liquors for beverage purposes, is operative throughout the entire territorial limits of the United States and of its own force invalidates every legislative act of Congress, state Legislatures, or territorial assemblies, authorizing or sanctioning what it prohibits.

7. INTOXICATING LIQUORS ¶13—PROHIBITION AMENDMENT ONLY AUTHORIZES STATUTES ENFORCING ITS PROVISIONS.

Const. Amend. 18, § 2, giving Congress and the states concurrent power to enforce such amendment by appropriate legislation, does not authorize Congress or the states to defeat or thwart the prohibition contained in section 1, but only to enforce it by appropriate means.

8. INTOXICATING LIQUORS ¶13—CONGRESSIONAL LEGISLATION UNDER PROHIBITION AMENDMENT NEED NOT BE JOINED IN OR SANCTIONED BY STATES; "CONCURRENT POWER."

The words "concurrent power," in Const. Amend. 18, § 2, giving concurrent power to Congress and the states to enforce that amendment, do not mean a joint power or require that legislation thereunder by Congress to be effective, shall be approved or sanctioned by the several states, or any of them.

9. INTOXICATING LIQUORS ¶13—POWER OF CONGRESS NOT LIMITED TO INTERSTATE TRANSACTIONS.

Const. Amend. 18, § 2, does not divide the power to enforce such amendment between Congress and the states along lines which separate or distinguish foreign and interstate commerce from intrastate affairs, but confides to Congress power territorially coextensive with the prohibition of the first section and embracing manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic.

10. INTOXICATING LIQUORS ¶13—POWER OF CONGRESS NOT DEPENDENT ON ACTION OF THE STATES.

The power conferred on Congress by Const. Amend. 18, § 2, to enforce the prohibition contained in section 1, is in no wise dependent on, or affected by, action or inaction on the part of the states, or any of them.

11. INTOXICATING LIQUORS ¶13—CONGRESS MAY PROHIBIT DISPOSAL OF LIQUORS MANUFACTURED PRIOR TO PROHIBITION AMENDMENT.

Under Const. Amend. 18, Congress may prohibit the disposal, for beverage purposes, of

liquors manufactured before such amendment became effective.

**12. INTOXICATING LIQUORS §13—NATIONAL PROHIBITION ACT IS WITHIN POWERS OF CONGRESS.**

The National Prohibition Act, which treats liquors containing one-half of 1 per cent. of alcohol by volume and fit for use for beverage purposes as within the powers of enforcement conferred on Congress by Const. Amend. 18, does not transcend the powers so conferred.

Mr. Justice McKenna and Mr. Justice Clarke dissenting in part.

No. 696: Appeal from the District Court of the United States for the District of Massachusetts.

No. 752: Appeal from the District Court of the United States for the Western District of Kentucky.

No. 788: Appeal from the District Court of the United States for the District of New Jersey.

No. 794: Appeal from the District Court of the United States for the Eastern District of Wisconsin.

No. 837: Appeal from the District Court of the United States for the Eastern District of Missouri.

Original suits by the State of Rhode Island and by the State of New Jersey against A. Mitchell Palmer, Attorney General, and others. Suits dismissed.

Suits by George C. Dempsey against Thomas J. Boynton, as United States Attorney, and others, by the Kentucky Distilleries & Warehouse Company against W. V. Gregory, as United States Attorney, and others, by Christian Feigenspan, a corporation, against Joseph L. Bodine, as United States attorney, and others, by the Manitowoc Products Company against Hiram A. Sawyer, as United States Attorney, and others, and by the St. Louis Brewing Association against George H. Moore, Collector, and others. From a decree in favor of plaintiff in the suit by the Manitowoc Products Company, defendants appeal, and from decrees for the defendants in the other suits, the plaintiffs appeal. Decree in the suit by the Manitowoc Products Company reversed, and decrees in the other suits affirmed.

For opinion below in Christian Feigenspan v. Bodine, see 264 Fed. 186.

See, also, State of Rhode Island v. Palmer, 40 Sup. Ct. 179, 64 L. Ed. —; State of New Jersey v. Palmer, 252 U. S. 570, 40 Sup. Ct. 345, 64 L. Ed. —.

No. 29. Argued March 8 and 9, 1920:

**\*353**

\*Mr. Herbert A. Rice, of Providence, R. I., for complainant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for respondents.

No. 30. Argued March 29, 1920:

Mr. Thomas F. McCran, of Paterson, N. J., for complainant.

Mr. Assistant Attorney General Frierson, for respondents.

No. 696. Argued March 9, 1920:

Mr. Patrick Henry Kelley, of Boston, Mass., for appellant.

Mr. Assistant Attorney General Frierson, for appellees.

No. 752. Argued March 9 and 10, 1920:

Messrs. Levy Mayer, of Chicago, Ill., and William Marshall Bullitt, of Louisville, Ky., for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

No. 788. Argued March 29 and 30, 1920:

Messrs. Elihu Root and William D. Guthrie, both of New York City, for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

No. 794. Argued March 30, 1920:

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellants.

Mr. Ralph W. Jackman, of Madison, Wis., for appellee.

No. 837. Submitted March 29, 1920:

Messrs. Charles A. Houts, John T. Fitzsimmons, and Edward C. Crow, all of St. Louis, Mo., for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

**\*384**

\*Mr. Justice VAN DEVANTER announced the conclusions of the Court.

Power to amend the Constitution was reserved by article 5, which reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the

**\*385**

Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The text of the Eighteenth Amendment, proposed by Congress in 1917 and proclaimed as ratified in 1919 (40 Stat. 1050, 1941), is as follows:



"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 85, Acts 66th Cong., 1st Sess. (41 Stat. 305), which was adopted to enforce the amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, original,—were brought in this court, and the others in District Courts. Nos. 696, 752, 788, and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the

\*386

bar and in \*printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

[1] 1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

[2] 2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Missouri Pacific Ry. Co. v. Kansas*, 248 U. S. 276, 39 Sup. Ct. 93, 63 L. Ed. 239, 2 A. L. R. 1589.

[3] 3. The referendum provisions of state Constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. —, decided June 1, 1920.

[4] 4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by article 5 of the Constitution.

[5] 5. That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

[6] 6. The first section of the amendment—the one embodying the prohibition—is op-

erative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force in-

\*387

validates every \*legislative act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

[7] 7. The second section of the amendment—the one declaring "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

[8-10] 8. The words "concurrent power," in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

[11] 10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

[12] 11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as one-half of 1 per cent. of alcohol

\*388

by volume and fit for use for beverage \*purposes are treated as within that power. *Jacob Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. —.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, original, the bills are dismissed.

In No. 794, the decree is reversed.

In Nos. 696, 752, 788 and 837, the decrees are affirmed.

Mr. Chief Justice WHITE concurring.

I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state

governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involve and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily in doing this I notice various contentions made concerning the proper construction of the provisions of the amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the amendment.

The amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits—

"the manufacture, sale, or transportation of intoxicating liquors within, the importation

\*389

thereof into, \*or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

The second is as follows:

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the states in enforcing the prohibition of the first section and hence that in the absence of such concurrent action by Congress and the states no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as to practically nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the states does not as a prerequisite exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states and makes each action effective, but as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict the state legislation yields to the action of Congress as

controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent

\*390

powers conferred upon Congress and the states are not subject to conflict because their exertion is authorized within different areas, that is, by Congress within the field of federal authority, and by the states within the sphere of state power, hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a state, since the basis of the distinction upon which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction and therefore is not operative within a state.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve in my judgment to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true indeed that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is indisputable, as I

\*391

have stated, \*that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such



regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to state and nation is, not to construct or perfect or cause the amendment to be completely operative, but as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist no one would gainsay that the first section in and of itself granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become

\*392

fully operative. This being \*true it would follow, if the contentions under consideration were sustained, that the second section gave the states the power to nullify the first section, since a refusal of a state to define and sanction would again result in no amendment to be enforced in such refusing state.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice McREYNOLDS concurring.

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteenth

Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive.

Mr. Justice McKENNA, dissenting.

This case is concerned with the Eighteenth Amendment of the Constitution of the United States, its validity and construction. In order to have it, and its scope in attention, I quote it:

\*393

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The court in applying it has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgment reversing No. 794 and affirming Nos. 752, 696, 788, and 837.

I am, however, at a loss how or to what extent to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase its lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the Eighteenth Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and has become part of the Constitution of the United States, to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5, and 6 seem to assert the undisputed. I neither assent to them or dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration.

\*394

My only comment is that I know of no \*intimation in the case that section 2 in conferring concurrent power on Congress and the states to enforce the prohibition of the first section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition and was made concurrent to engage the resources and instrumentalities of the nation and the states. The power was conferred for use, not for abuse.

Conclusions 8 and 9, as I view them, are

complements of each other, and express, with a certain verbal detail, the power of Congress and the states over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the states, its exportation from them, and its importation into them. In a word, give power over the liquor business from producer to consumer, prescribe the quality of latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of section 2 do not mean joint power in Congress and the states, nor the approval by the states of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are, or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts, and there are conflicts, and more there may be, between it and state legislation? The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered states are litigants as well as private citizens, the former presenting the rights of the states, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state

\*395

legislation, why not a decision upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the states, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the states being supreme and exclusive within the spheres of their exercise—called by counsel "historical fields of jurisdiction." I submit again, they should have consideration and decision.

The government has felt and exhibited the necessity of such consideration and decision. It knows the conflicts that exist or impend. It desires to be able to meet them, silence them and bring the repose that will come from a distinct declaration and delimitation of the power of Congress and the states. The court, however, thinks otherwise and I pass to the question in the case. It is a simple one, it involves the meaning of a few English words—in what sense they shall be taken, whether in their ordinary sense, or have put upon them an unusual sense.

Recurring to the first section of the amend-

ment, it will be seen to be a restriction upon state and congressional power, and the deduction from it is that neither the states nor Congress can enact legislation that contravenes its prohibition. And there is no room for controversy as to its requirement. Its prohibition of "intoxicating liquors" "for beverage purposes" is absolute. And, as accessory to that prohibition, is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation "from the United States." Its prohibition, therefore, is national, and considered alone, the means of its enforcement might be such as Congress, the agency of

\*396

national power might prescribe. But it does not stand alone. Section 2 associates Congress and the states in power to enforce it. Its words are:

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

What, then, is meant by the words "concurrent power"? Do they mean united action, or separate and independent action, and, if the actions differ (there is no practical problem unless they differ), shall that of Congress be supreme?

The government answers that the words mean separate and independent action, and, in case of conflict, that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents.<sup>1</sup> I contest the assertions and oppose to them the common usage of our language,

\*397

and the definitions of our lexicons, \*general and legal.<sup>2</sup> Some of the definitions assign to

<sup>1</sup> The following is the contention of the government which we give to accurately represent it: "It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means, in other connections, a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections, it has a well-fixed and established meaning, which is controlled in this case."

And again: "It is to be noted that section 2 does not say that legislation shall be concurrent, but that concurrent power to legislate shall exist. The concurrent power of the states and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers in referring to the concurrent power of Congress and the states to legislate."

And after citing cases, the government says: "It will thus be seen that in legal nomenclature the concurrent power of the states and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject-matter separately and independently."

<sup>2</sup> Definitions of the dictionaries are as follows: The Century: "Concurrent: \* \* \* 2. Concurring; acting in conjunction; agreeing in the same act; contributing to the same event or effect; operat-



the words "concurrent power" action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance. Such is the result of the government's contention. It does not satisfy the definitions, or the requirement of section 2—"a concurrent power excludes the idea of a dependent power." Mr. Justice McLean in the Passenger Cases, 7 How. 283, 399, 12 L. Ed. 702.

Other definitions assign to the words "existing or happening at the same time," "concurring together," "coexistent." These definitions are, as the others are, inconsistent with the government's contention. If co-existence of the power of legislation is given to Congress and the states by section 2, it is given to be coexistently exercised. It is to be remembered that the Eighteenth Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation, and it was naturally thought that legislation enacted by "the Congress and the several states," by its concurrence would better enforce prohibition and avail for its enforcement the two great

\*398

divisions of our governmental system, \*the nation and the states, with their influences and instrumentalities.

From my standpoint, the exposition of the case is concluded by the definition of the words of section 2. There are, however, confirming considerations; and militating considerations are urged. Among the confirming considerations are the cases of *Wedding v. Meyler*, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833, and *Nielsen v. Oregon*, 212 U. S. 315, 29 Sup. Ct. 383, 53 L. Ed. 528, in which "concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio river by the Virginia Compact, and respectively to Washington and Oregon over the Columbia river by act of Congress. And it was decided that it conferred equality of powers, "legislative, judicial and executive," and that neither state could override the legislation of the other. Other courts have given like definitions. 2 Words and Phrases Judicially Defined, p. 1391 et seq.; *Bouvier's Dictionary*, vol. 1, page 579. Analogy of the word "concurrent" in private instruments may also be invoked.

Those cases are examples of the elemental

rule of construction that in the exposition of statutes and constitutions, every word "is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it," and there cannot be imposed upon the words "any recondit meaning or any extraordinary gloss." 1 Story, Const. § 451; *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060. And it is the rule of reason as well as of technicality, that if the words so expounded be "plain and clear, and the sense distinct and perfect arising on them" interpretation has nothing to do. This can be asserted of section 2. Its words express no "double sense," and should be accepted in their single sense. It has not yet been erected into a legal maxim of constitutional construction, that words were made to conceal thoughts. Besides, when we depart from the words, ambiguity comes. There are

\*399

as many solutions \*as there are minds considering the section, and out of the conflict, I had almost said chaos, one despairs of finding an undisputed meaning. It may be said that the court, realizing this, by a declaration of conclusions only, has escaped the expression of antithetical views and considered it better not to blaze the trails, though it was believed that they all led to the same destination.

If it be conceded, however, that to the words "concurrent power" may be ascribed the meaning for which the government contends, it certainly cannot be asserted that such is their ordinary meaning, and I might leave section 2, and the presumptions that support it, to resist the precedents adduced by the government. I go farther, however, and deny the precedents. The *Federalist* and certain cases are cited as such. There is ready explanation of both, and neither supports the government's contention. The dual system of government contemplated by the Union encountered controversies, fears, and jealousies that had to be settled or appeased to achieve union, and the *Federalist* in good and timely sense explained to what extent the "alienation of state sovereignty" would be necessary to "national sovereignty," constituted by the "consolidation of the states," and the powers that would be surrendered, and those that would be retained. And the explanation composed the controversies and allayed the fears of the states that their local powers of government would not be displaced by the dominance of a centralized control. And this court after union had been achieved, fulfilled the assurances of the explanation and adopted its distribution of powers, designating them as follows: (1) Powers that were exclusive in the states—reserved to them; (2) powers that were exclusive in Congress, conferred upon it; (3) powers that were not exclusive in either, and hence said to be "concurrent." And it was

ing with; coincident. 3. Conjoint; joint; concomitant; coordinate; combined. \* \* \* That which concurs; a joint or contributory thing." Webster's first definition is the same as that of the Century. The second is as follows: "Joint; associate; concomitant; existing or happening at the same time."

decided that, when exercised by Congress, they were supreme—"the authority of the states then retires" <sup>\*400</sup> to inaction. \*To understand them, it must be especially observed that their emphasis was, as the fundamental principle of the new government was, that it had no powers that were not conferred upon it, and that all other powers were reserved to the states. And this necessarily must not be absent from our minds, whether construing old provisions of the Constitution or amendments to it or laws passed under the amendments.

The government nevertheless contends that the decisions (they need not be cited) constitute precedents for its construction of section 2 of the Eighteenth Amendment. In other words, the government contends (or must so contend for its reasoning must bear the test of the generalization) that it was decided that in all cases where the powers of Congress are concurrent with those of the states, they are supreme as incident to concurrence. The contention is not tenable; it overlooks the determining consideration. The powers of Congress were not decided to be supreme because they were concurrent with powers in the states, but because of their source, their source being the Constitution of the United States and the laws made in pursuance of the Constitution, as against the source of the powers of the states, their source being the Constitution and laws of the states, the Constitution and laws of the United States being made by article 6 the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *McCulloch v. Maryland*, 4 Wheat. 316, 426, 4 L. Ed. 579.

This has example in other powers of sovereignty that the states and Congress possess. In *McCulloch v. Maryland*, at pages 425, 430 of 4 Wheat. (4 L. Ed. 579), Chief Justice Marshall said that the power of taxation retained by the states was not abridged by the granting of a similar power to the government of the Union, and that it was to be concurrently exercised, and these truths, it was added, had never been denied, and that there was no "clashing sovereignty" from incompatibility of right. And, neces-

<sup>\*401</sup>

sarily, a con\*currency of power in the states and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that section 2 by giving concurrent power to Congress and the states, gave Congress supreme power over the states. I repeat the declaration of Mr. Justice McLean:

"A concurrent power excludes the idea of a dependent power."

It is, however, suggested (not by the government) that if Congress is not supreme upon the considerations urged by the govern-

ment, it is made supreme by article 6 of the Constitution. The article is not applicable. It is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the Constitutions and laws of the states. *Gibbons v. Ogden*, 9 Wheat. 1, 209, 6 L. Ed. 23, 211; *Sec. 1838 et seq.*; 2 Story, *Const.*, 5th Ed.

The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as article 6. There seems to be a denial of this, based on article 5. That article provides that the amendments proposed by either of the ways there expressed "shall be valid to all intents and purposes as part of this Constitution." Some undefinable power is attributed to this in connection with article 6, as if article 5 limits in some way, or defeats, an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have and it would be nullified by the mythical power attributed to article 5, either alone or in conjunction with article 6? A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it. Section 2, therefore, is a new provision of power, power <sup>\*402</sup>

to the \*states as well as to Congress, and it is a contradiction to say that a power constitutionally concurrent in Congress and the states, in some way becomes constitutionally subordinate in the states to Congress.

If it be said that the states got no power over prohibition that they did not have before, it cannot be said that it was not preserved to them by the amendment, notwithstanding the policy of prohibition was made national, and besides, there was a gift of power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the states should remain with the states and be participated in by Congress only in concurrence with the states, and thereby preserved from abuse by either, or exercise to the detriment to prohibition. There was, however, a power given to the states, a power over importations. This power was subject to concurrence with Congress and had the same safeguards.

This construction of section 2 is enforced by other considerations. If the supremacy of Congress had been intended it would have been directly declared as in the Thirteenth, Fourteenth and Fifteenth Amendments. And such was the condition when the amendment left the Senate. The precedent of preceding amendments was followed, there was a single declaration of jurisdiction in Congress.



Section 2 was amended in the House upon recommendation of the Judiciary Committee and the provision giving concurrent power to Congress and to the states was necessarily estimated and intended to be additive of something. The government's contention makes it practically an addition of nothing but words, in fact denuding it of function, making it a gift of impotence, not one of power to be exercised independently of Congress or concurrently with Congress, or, indeed, at all. Of this there can be no contradiction, for what power is assigned to the states to legislate if the legislation be im-

\*403

mediately superseded—indeed, as this case shows, is possibly forestalled and precluded by the power exercised in the Volstead Act. And meaningless is the difference the government suggests between concurrent power and concurrent legislation. A power is given to be exercised, and we are cast into helplessness and groping bewilderment in trying to think of it apart from its exercise or the effect of its exercise. The addition to section 2 was a conscious adaptation of means to the purpose. It changed the relation between the states and the national government. The lines of exclusive power in one or the other were removed, and equality and community of powers substituted.

There is a suggestion, not made by the government, though assisting its contention, that section 2 was a gift of equal power to Congress and to the states, not, however, to be concurrently exercised, but to be separately exercised; conferred and to be exercised is the suggestion, to guard against neglect in either Congress or the states, the inactivity of the one being supplied by the activity of the other. But here again we encounter the word "concurrent" and its inexorable requirement of coincident or united action, not alternative or emergent action to safeguard against the delinquency of Congress or the states. If, however, such neglect was to be apprehended, it is strange that the framers of section 2, with the whole vocabulary of the language to draw upon, selected words that expressed the opposite of what the framers meant. In other words, expressed concurrent action instead of substitute action. I cannot assent. I believe they meant what they said and that they must be taken at their word.

The government with some consciousness that its contention requires indulgence or excuse, but at any rate in recognition of the insufficiency of its contention to satisfy the words of section 2, makes some concessions to the states. They are, however, not very tangible to measurement. They seem to

\*404

yield a power of legislation to the states and a power of jurisdiction to their courts, but almost at the very instant of concession, the power and jurisdiction are declared to be without effect.

I am not, therefore, disposed to regard the concessions seriously. They confuse—"make not light, but darkness, visible." Of what use is a concession of power to the states to enact laws which cannot be enforced? Of what use a concession of jurisdiction to the courts of the states when their judgments cannot be executed, indeed the very law upon which it is exercised may be declared void in an antagonistic jurisdiction exerted in execution of an antagonistic power?<sup>3</sup> And equally worthless is the analogy that the government assays between the power of the national government and the power of the states to criminally punish violations of their respective sovereignties, as, for instance, in counterfeiting cases. In such cases the exercises of sovereignty are not in antagonism. Each is inherently possessed and independently exercised, and can be enforced no matter what the other sovereignty may do or abstain from doing. On the other hand, under the government's construction of section 2, the legislation of Congress is supreme and exclusive. Whatever the states may do is abortive of effect.

The government seeking relief from the perturbation of mind and opinions produced by departure from the words of section 2, suggests a modification of its contention, that in case of conflict between state legis-

\*405

lation and congressional legislation, that of Congress would prevail, by intimating that if state legislation be more drastic than congressional legislation, it might prevail, and in support of the suggestion, urges that section 1 is a command to prohibition, and that the purpose of section 2 is to enforce the command, and whatever legislation is the most prohibitive subserves best the command, displaces less restrictive legislation and becomes paramount. If a state, therefore, should define an intoxicating beverage to be one that has less than one-half of 1 per cent. of alcohol, it would supersede the Volstead Act and a state might even keep its legislation supreme by forestalling congressional retaliation by prohibiting all artificial beverages of themselves innocuous, the prohibition being accessory to the main purpose of power; adducing *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, and *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141. Of course this concession of the

<sup>3</sup> The government feels the inconsistency of its concessions and recessions. It asserts at one instant that the legislation of the states may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the federal courts for the same act as a violation of the federal law. From this situation the government hopes that there will be rescue by giving the Eighteenth Amendment "such meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offence in the courts of the other." The government considers, however, the question is not now presented.

more drastic legislation destroys all that is urged for congressional supremacy, for necessarily supremacy cannot be transferred from the states to Congress or from Congress to the states as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" and declares "that those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the states as well.

From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the amendment—will it not bring to the enforcement of prohibition, the power of

\*406

the states and the power of \*Congress, make all the instrumentalities of the states, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its court and officers, agencies of the enforcement? Will it not bring to the states as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections; and it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so sacrifices nothing of, the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the amendment, for without legislation its prohibition would be ineffectual, and that it is impossible to secure the concurrence of Congress and the states in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the amendment, will impel its execution through Congress and the states. It may not be in such legislation as the Volstead Act with its  $\frac{1}{2}$  of 1 per cent. of alcohol or in such legislation as some of the states have enacted with their 2.75 per cent. of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement in view of the requirement of section 2, it may be answered as this court answered in *Wedding v. Meyler*, supra:

"The conveniences and inconveniences of concurrent" power by the Congress and the states

"are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but in the relief of the solitude of my position, I invoke the coincidence of my views

\*407

with \*those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

Mr. Justice CLARKE dissents. See 253 U. S. 350, 40 Sup. Ct. 588, 64 L. Ed. —.

(253 U. S. 221)

HAWKE v. SMITH, Secretary of State of Ohio.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 582.

1. STATES ⇐4—FEDERAL CONSTITUTION SUPREME LAW OF THE LAND.

The powers specifically conferred on the general government by the Constitution were surrendered by the states, and the Constitution and laws of the United States are the supreme law of the land.

2. CONSTITUTIONAL LAW ⇐10—METHOD OF RATIFYING AMENDMENTS DETERMINABLE BY CONGRESS AND LIMITED TO METHODS SPECIFIED.

Under Const. art. 5, providing for the ratification of proposed amendments by the Legislatures of three-fourths of the states or by conventions in three-fourths thereof, as one or the other mode may be proposed by Congress, the power of determining the method of ratification is conferred upon Congress, and is limited to the two methods specified.

3. CONSTITUTIONAL LAW ⇐10—COURTS OR LEGISLATIVE BODIES CANNOT ALTER METHODS OF RATIFYING AMENDMENTS.

It is not the function of courts or legislative bodies, national or state, to alter the method of ratifying proposed amendments to the federal Constitution, which the Constitution has fixed.

4. CONSTITUTIONAL LAW ⇐10—"LEGISLATURES" EMPOWERED TO RATIFY AMENDMENTS DEFINED.

The word "legislatures," in Const. art. 5, relative to the ratification of the proposed amendments, has the same meaning as when the Constitution was adopted, and means the representative body which makes the laws of the people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislation.]

5. CONSTITUTIONAL LAW ⇐10—RATIFICATION OF AMENDMENT NOT ACT OF "LEGISLATION."

Ratification by a state of a proposed amendment to the federal Constitution is not an act



of "legislation," within the proper sense of the word, but the expression of the assent of the state to the proposed amendment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislation.]

**6. CONSTITUTIONAL LAW §10—POWER TO RATIFY AMENDMENTS DERIVED FROM CONSTITUTION.**

While the power of a state Legislature to legislate in the enactment of laws for the state is derived from the people of the state, the power to ratify a proposed amendment to the federal Constitution has its source in such Constitution.

**7. CONSTITUTIONAL LAW §10—STATE CANNOT PROVIDE REFERENDUM ON RATIFICATION OF AMENDMENT TO FEDERAL CONSTITUTION.**

A state has no authority to provide for the submission to a referendum under the state Constitution of the ratification of a proposed amendment to the federal Constitution, as is attempted by the amendment of 1918 to the Constitution of Ohio.

In Error to the Supreme Court of the State of Ohio.

Suit by George S. Hawke against Harvey C. Smith, as Secretary of State of Ohio. A judgment sustaining a demurrer to the petition was affirmed by the Court of Appeals and Supreme Court of Ohio (126 N. E. 400), and plaintiff brings error. Reversed and remanded.

\*222

\*Mr. J. Frank Hanly, of Indianapolis, Ind., for plaintiff in error.

Mr. Lawrence Maxwell, of Cincinnati, Ohio, for defendant in error.

\*224

\*Mr. Justice DAY delivered the opinion of the Court.

Plaintiff in error (plaintiff below) filed a petition for an injunction in the court of common pleas of Franklin county, Ohio, seeking to enjoin the secretary of state of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of the ratification which the General Assembly had made of the proposed Eighteenth Amendment to the federal Constitution. A demurrer to the petition was sustained in the court of common pleas. Its judgment was affirmed by the Court of Appeals of Franklin County, which judgment was affirmed by the Supreme Court of Ohio, and the case was brought here.

A joint resolution proposing to the states this amendment to the Constitution of the United States was adopted on the 3d day of December, 1917. 40 Stat. 1050. The amendment prohibits the manufacture, sale or

\*225

transportation of \*intoxicating liquors within, the importation thereof into, or the ex-

portation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes. The several states were given concurrent power to enforce the amendment by appropriate legislation. The resolution provided that the amendment should be inoperative unless ratified as an amendment of the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission thereof to the states. The Senate and House of Representatives of the state of Ohio adopted a resolution ratifying the proposed amendment by the General Assembly of the state of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the Governor to the Secretary of State at Washington and to the presiding officer of each House of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the Governor of Ohio complied with the resolution. On January 29, 1919, the Secretary of State of the United States proclaimed the ratification of the amendment, naming 36 states as having ratified the same, among them the state of Ohio.

The question for our consideration is: Whether the provision of the Ohio Constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the General Assembly of proposed amendments to the federal Constitution is in conflict with article 5 of the Constitution of the United States. The amendment of 1918 provides:

"The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States."

Article 5 of the federal Constitution provides:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose

\*226

amendments \*to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

[1] The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the

people of the United States. *McCulloch v. Maryland*, 4 Wheat. 316, 402, 4 L. Ed. 579. The states surrendered to the general government the powers specifically conferred upon the nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the Legislatures of two-thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by Legislatures

or conventions, call for <sup>\*227</sup>action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

[2, 3] The fifth article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states, or conventions in a like number of states. *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

[4] The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of

electors of Congressmen as those "requisite for electors of the most numerous branch of the state Legislature." Article 1, section 3, provided that Senators shall be chosen in each state by the Legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amend-

ment, which made <sup>\*228</sup>provision for the election of Senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state Legislature. That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the Legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In article 4 the United States is required to protect every state against domestic violence upon application of the Legislature, or of the executive when the Legislature cannot be convened. Article 6 requires the members of the several Legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By article 1, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the Legislature of the state in which the same shall be. Article 4, section 3, provides that no new states shall be carved out of old states without the consent of the Legislatures of the states concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, section 2.

The Constitution of Ohio in its present <sup>\*229</sup>form, although making provision for a referendum, vests the legislative power primarily in a General Assembly, consisting of a Senate and House of Representatives. Article 2, section 1, provides:

"The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives, but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."



[5] The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth et al. v. Virginia*, 3 Dall. 378, 1 L. Ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1, section 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution invest-

\*230  
ing \*the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said:

"There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution."

The court by a unanimous judgment held that the amendment was constitutionally adopted.

[6] It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

This view of the amendment is confirmed in the history of its adoption found in 2 *Watson on the Constitution*, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states.

But it is said this view runs counter to the decision of this court in *Davis v. Hildebrandt*, 241 U. S. 565, 36 S. Ct. 708, 60 L. Ed. 1172. But that case is inapposite. It dealt with

article 1 section 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective Legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a

\*231  
\*view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

[7] It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(253 U. S. 231)

HAWKE v. SMITH, Secretary of State of Ohio.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 601.

In Error to the Supreme Court of the State of Ohio.

Suit by George S. Hawke against Harvey C. Smith, as Secretary of State of Ohio. To review an adverse judgment of the Supreme Court of Ohio (127 N. E. 924), plaintiff brings error. Reversed.

Messrs. J. Frank Hanly, of Indianapolis, Ind., George S. Hawke, of Cincinnati, Ohio, and Arthur Hellen, of Washington, D. C. (Messrs. Charles B. Smith, of Cincinnati, Ohio, and James Bingham and Reinster A. Bingham, both of Indianapolis, Ind., of counsel), for plaintiff in error.

\*232  
\*Messrs. John G. Price, Atty. Gen., and B. W. Gearheart, of Columbus, Ohio (Judson Harmon and Lawrence Maxwell, both of Cincinnati, Ohio, of counsel), for defendant in error.

Messrs. Shippen Lewis, William Draper Lewis, and George Wharton Pepper, all of Philadelphia, Pa., amici curiae.

Mr. Justice DAY delivered the opinion of the Court.

This case presents the same question as that already decided in No. 582, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. —; the only difference

being that the amendment involved is the proposed Nineteenth Amendment to the Constitution extending the right of suffrage to women. The Supreme Court of Ohio, upon the authority of its decision in *Hawke v. Smith*, 126 N. E. 500, held that the Constitution of the state requiring such submission by a referendum to the people, did not violate article 5 of the federal Constitution, and for that reason rendered a like judgment as in No. 582.

For the reasons stated in our opinion in No. 582, the judgment of the Supreme Court of Ohio must be

Reversed.

(253 U. S. 233)

GREEN et al. v. FRAZIER, Governor, et al.

(Argued April 19 and 20, 1920. Decided June 1, 1920.)

No. 811.

1. COURTS  $\hookrightarrow$ 366(1)—STATE DECISIONS CONCLUSIVE ON SUPREME COURT AS TO STATE QUESTIONS.

A decision of a state Supreme Court sustaining the constitutionality of legislation is conclusive on review by the federal Supreme Court, so far as it rests on state grounds.

2. CONSTITUTIONAL LAW  $\hookrightarrow$ 283 — TAXATION FOR PRIVATE PURPOSES DENIES DUE PROCESS.

Under Const. Amend. 14, forbidding the states to deprive persons of life, liberty, or property without due process of law, a state cannot impose taxes for merely private purposes.

3. CONSTITUTIONAL LAW  $\hookrightarrow$ 48—PRESUMPTION INDULGED IN FAVOR OF EXERCISE OF TAXING POWER.

Every presumption is indulged in favor of the exercise by a state of its taxing power, when attacked as taking property without due process of law, and only clear and demonstrated usurpation of power will authorize judicial interference.

4. CONSTITUTIONAL LAW  $\hookrightarrow$ 48 — TAXATION WILL NOT BE HELD FOR PRIVATE PURPOSE, UNLESS CLEARLY SO.

When the people, the Legislature, and the highest court of the state have united in declaring that the purpose for which money is being raised by taxation is of a public nature, the Supreme Court will not interfere, unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated.

5. CONSTITUTIONAL LAW  $\hookrightarrow$ 70(3) — COURTS NOT CONCERNED WITH WISDOM OR POLICY OF LEGISLATION.

With the wisdom of state legislation, attacked as taking property without due process of law, by imposing taxes for private purposes, and with the soundness of the economic policy involved, the federal Supreme Court has no concern.

6. CONSTITUTIONAL LAW  $\hookrightarrow$ 283—TAXATION  $\hookrightarrow$ 38—LEGISLATION HELD NOT TO DENY DUE PROCESS BY IMPOSING TAXES FOR PRIVATE PURPOSES.

Act N. D. Feb. 25, 1919 (Laws 1919, c. 151), creating the Industrial Commission, with extensive powers; the Bank of North Dakota Act (Laws 1919, c. 147), establishing a bank operated by the state under the control of such commission; the act (Laws 1919, c. 148) providing for a bond issue to create the capital of such bank; the act (Laws 1919, c. 154) providing for a bond issue to replace funds employed by the bank in making loans on real estate; the act (Laws 1919, c. 152) providing for the engagement by the state in the business of manufacturing and marketing farm products and for the establishment of a warehouse, elevator, and flour mill system operated by the state; the act (Laws 1919, c. 153) providing for a bond issue for the purpose of carrying on the business of the mill and elevator association; and the Home Building Act (Laws 1919, c. 150), declaring the purpose of the state to engage in the enterprise of providing homes for its residents and to operate a home building association—do not take property without due process of law, by imposing taxes for private purposes, in view of the conditions existing in North Dakota as found by the Supreme Court of that state.

In Error to the Supreme Court of the State of North Dakota.

Action by E. A. Green and others against Lynn J. Frazier, Governor, and others. An order sustaining a demurrer to the complaint was affirmed by the Supreme Court of North Dakota (176 N. W. 11), and plaintiffs bring error. Affirmed.

Mr. Thomas C. Daggett, of St. Paul, Minn., for plaintiffs in error.

Mr. Frederick A. Pike, of St. Paul, Minn., for certain defendants in error.

Mr. Justice DAY delivered the opinion of the Court.

This is an action by taxpayers of the state of North Dakota against Lynn J. Frazier,

<sup>\*234</sup>  
Governor, John N. Hagan, Commissioner of Agriculture and Labor, William Langer, Attorney General, and Obert Olson, State Treasurer, and the Industrial Commission of that state, to enjoin the enforcement of certain state legislation. The defendants Lynn J. Frazier, as Governor, William Langer, as Attorney General, and John Hagan, as Commissioner of Agriculture and Labor, constitute the Industrial Commission, created by the Act of February 25, 1919, of the Sixteenth Legislative Assembly of the state of North Dakota (Laws 1919, c. 151).

[1] The laws involved were attacked on various grounds, state and federal. The Supreme Court of North Dakota sustained the constitutionality of the legislation. So far as the decision rests on state grounds it is conclusive, and we need not stop to inquire



concerning it. *Davis v. Hildebrant*, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. The only ground of attack involving the validity of the legislation which requires our consideration concerns the alleged deprivation of rights secured to the plaintiffs by the Fourteenth Amendment to the federal Constitution. It is contended that taxation under the laws in question has the effect of depriving plaintiffs of property without due process of law.

The legislation involved consists of a series of acts passed under the authority of the state Constitution, which are: (1) An act creating an Industrial Commission of North Dakota, which is authorized to conduct and manage on behalf of that state certain utilities, industries, enterprises, and business projects, to be established by law. The act gives authority to the commission to manage, operate, control, and govern all utilities, enterprises, and business projects owned, undertaken, administered, or operated by the state of North Dakota, except those carried on in penal, charitable, or educational institutions. To that end certain powers and authority are given to the commission, among others: The right of eminent domain; to fix the buy-

\*235

ing price of things bought, \*and the selling price of things sold, incidental to the utilities, industries, enterprises, and business projects, and to fix rates and charges for services rendered, having in mind the accumulation of a fund with which to replace in the general funds of the state the amount received by the commission under appropriations made by the act; to procure the necessary funds for such utilities, industries, enterprises, and business projects by negotiating the bonds of the state in such amounts and in such manner as may be provided by law. \$200,000 of the funds of the state are appropriated to carry out the provisions of the act. (2) The Bank of North Dakota Act (Laws 1919, c. 147), which establishes a bank under the name of "The Bank of North Dakota," operated by the state. The Industrial Commission is placed in control of the operation and management of the bank, and is given the right of eminent domain to acquire necessary property. Public funds are to be deposited in the bank, and the deposits are guaranteed by the state of North Dakota. Authority is given to transfer funds to other departments, institutions, utilities, industries, enterprises, or business projects, and to make loans to counties, cities, or political subdivisions of the state, or to state or national banks, on such terms as the commission may provide. Loans to individuals, associations, and private corporations are authorized, when secured by duly recorded first mortgages on lands in the state of North Dakota. An appropriation of \$100,000 is made immediately available to carry out the provisions of the act. (3) An act (Laws 1919, c. 148) providing for the issuing of bonds of the

state in the sum of \$2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. The earnings of the bank are to be paid to the state treasurer. Tax levies are authorized sufficient to pay the interest on the bonds annually. The bonds shall mature in periods of five years, and the board of equalization is authorized

\*236

to levy a tax in an amount \*equal to one-fifth of the amount of their principal. The state treasurer is required to establish a bank bond payment fund into which shall be paid moneys received from taxation, from appropriations and from bank earnings. \$10,000 is appropriated for the purpose of carrying the act into effect. (4) An act (Laws 1919, c. 154) providing for the issuing of bonds in the sum of not exceeding \$10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. The faith and credit of the state of North Dakota are pledged for the payment of the bonds. Moneys derived from the sale of the bonds are to be placed by the Industrial Commission in the funds of the bank, and nothing in the act is to be construed to prevent the purchase of the bonds with any funds in the Bank of North Dakota. It is further provided that the state board of equalization shall, if it appears that the funds in the hands of the state treasurer are insufficient to pay either principal or interest, accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. Provision is made for the repeated exercise of the powers granted by the act, for the purposes stated. An appropriation of \$10,000 is made for carrying into effect the provisions of this act. (5) An act (Laws 1919, c. 152) declaring the purpose of the state of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system under the name of "North Dakota Mill & Elevator Association," to be operated by the state. The purpose is declared that the state shall engage in the business of manufacturing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories,

\*237

plants, machinery \*and equipment, owned, controlled, and operated by it under the name of the "North Dakota Mill & Elevator Association." The Industrial Commission is placed in control of the association, with full power, and it is authorized to acquire by purchase, lease, or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell, and exchange all kinds of raw and manufactured farm products, and by-products, and to operate exchanges, bureaus, markets and agencies

within and without the state, and in foreign countries. Provision is made for the bringing of a civil action against the state of North Dakota on account of causes of action arising out of the business. An appropriation is made out of state funds, together with the funds procured from the sale of state bonds, to be designated as the capital of the association. (6) An act (Laws 1919, c. 153) providing for the issuing of bonds of the state of North Dakota in a sum not exceeding \$5,000,000, to be known as "Bonds of North Dakota, Mill & Elevator Series," providing for a tax and making other provisions for the payment of the bonds, and appropriations for the payment of interest and principal thereof. The bonds are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association. The faith and credit of the state of North Dakota are pledged for the payment of the bonds, both principal and interest. These bonds may be purchased with funds in the Bank of North Dakota. Taxes are provided for sufficient to pay the bonds, principal and interest, taking into account the earnings of the association. The sum of \$10,000 is appropriated from the general funds of the state to carry the provisions of the act into effect. (7) The Home Building Act (Laws 1919, c. 150) declares the purpose of the state to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it under the name

\*238

of the "Home Building Association of North Dakota," and defines its duties and the extent of its powers. The Industrial Commission is placed in control of the "Home Building Association," and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at \$5,000, and of farm homes at \$10,000. A bond issue of \$2,000,000, known as "Bonds of North Dakota, Home Building Series," is provided for.

[2] There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the state was unrestrained by any federal authority. That amendment introduced a new limitation upon state power into the federal Constitution. The states were forbidden to deprive persons of life, liberty or property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, pre-

ferring to leave its scope to judicial decisions when cases from time to time arise. *Twining v. New Jersey*, 211 U. S. 78, 100, 29 Sup. Ct. 14, 53 L. Ed. 97.

The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed. 369. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed

\*239

by the late Mr. Justice Peckham speaking for the court. Concluding the discussion of that subject (164 U. S. 158, 17 Sup. Ct. 63, 41 L. Ed. 369), the Justice said:

"In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the federal government."

Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

[3] The taxing power of the states is primarily vested in their Legislatures, deriving their authority from the people. When a state Legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

[4] In the present instance under the authority of the Constitution and laws prevailing in North Dakota the people, the Legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state.

\*240

With this united action of people, \*Legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated. What is a public purpose has given rise to no little judi-



cial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. Gray, *Limitations of Taxing Power*, § 176.

"Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to continue the existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." Cooley, Justice, in *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400.

Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 569, 31 Sup. Ct. 259, 55 L. Ed. 328; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

[5] With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

[6] We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it

was justified for the purpose of providing banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the state of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent. of the wealth produced by the state was from agriculture, and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the

state), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the state of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine is whether this system

of legislation is violative of the federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in *Jones v. City of Portland*, 245 U. S. 217, 38 Sup. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660, in which we held that an act of the state of Maine (Rev. St. 1903, c. 4, § 87) authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessities to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment, and particularly that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the Supreme Court of Maine justifying the legislation under the conditions prevailing in that state. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Saving & Loan Association v. Topeka*, 20 Wall. 665, 22 L. Ed. 455. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in

the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the

\*243

opinion of its highest court, \*if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision. Affirmed.

(253 U. S. 243)

SCOTT et al. v. FRAZIER et al.

(Argued April 19 and 20, 1920. Decided June 1, 1920.) No. 508.

COURTS  $\S$ 328(4)—IN ABSENCE OF DIVERSE CITIZENSHIP JURISDICTIONAL AMOUNT MUST BE INVOLVED AS TO EACH COMPLAINANT.

In a suit to enjoin officers of a state from paying public funds and issuing state bonds, on the ground that rights under the Fourteenth Amendment are violated, where there is no diversity of citizenship, the amount in controversy must equal \$3,000 as to each complainant, to give jurisdiction to a federal court.

Appeal from the District Court of the United States for the District of North Dakota.

Suit by John W. Scott and others against Lynn J. Frazier and others. From a decree dismissing the bill on the merits (258 Fed. 669), plaintiffs appeal. Reversed and remanded, with directions to dismiss for want of jurisdiction.

Messrs. N. C. Young, of Fargo, N. D., and Tracy R. Bangs and C. J. Murphy, both of Grand Forks, N. D., for appellants.

Messrs. S. L. Nuchols, of Mandan, N. D., W. S. Lander, of Wahpeton, N. D., and Frederick A. Pike, of St. Paul, Minn., for appellees.

\*244

\*Memorandum opinion by direction of the Court by Mr. Justice DAY.

This suit, so far as the merits are concerned, is like No. 811, just decided. 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. —. It was brought in the District Court of the United States for the District of North Dakota to enjoin the payment of public funds in the state treasury and the issuing of state bonds under the Constitution and laws of North Dakota. We have sufficiently stated the nature of this Constitution and the laws involved in the opinion in No. 811.

The jurisdiction was invoked because of alleged violation of rights under the Fourteenth Amendment. The complainants were taxpayers of North Dakota, who alleged that suit was brought on behalf of themselves and all other taxpayers of the state. There was no diversity of citizenship and jurisdiction was rested solely upon the alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits; the judge stating that he was of opinion that there was no jurisdiction, and directing the dismissal on the merits to prevent delay, and to permit the suit being brought here by a single appeal.

There is no allegation that the loss or injury to any complainant amounts to the sum of \$3,000. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583; *Rogers v. Hennepin County*, 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.

The District Court was right in its conclusion that there was no jurisdiction. The decree is reversed, and the cause remanded to the District Court, with directions to dismiss the bill for want of jurisdiction.

So ordered.

MISSOURI PAC. RY. CO. v. MCGREW COAL CO.

(Decided June 1, 1920.)

No. 765.

APPEAL AND ERROR  $\S$ 465(2)—ON WRIT OF ERROR TO STATE COURT, BOND FOR SUPERSEDEAS EXCEEDING JUDGMENT REQUIRED.

Where a defendant against whom a judgment for \$14,000 was affirmed by the state court procured a writ of error with a supersedeas bond in the sum of \$2,000 only, which, however, provided that it should not affect the liability on the bond for appeal to the state court, the supersedeas will be vacated unless a bond for \$20,000 is given by the plaintiff in error.

Appeal from the Supreme Court of the State of Missouri.

Suit by the McGrew Coal Company against the Missouri Pacific Railway Company. A judgment for plaintiff was affirmed by the Supreme Court of the state of Missouri (217 S. W. 984), and defendant brings error. On motion by defendant in error to vacate supersedeas. Plaintiff in error ordered to furnish an additional bond, in default of which the supersedeas is to be vacated.

The motion to vacate supersedeas was as follows:

Defendant in error, McGrew Coal Company, moves this court to vacate the approval of the bond taken as a supersedeas herein by the honorable Chief Justice of the Supreme Court of Missouri, and for grounds of such motion does aver:

On April 20, 1915, in the circuit court of Lafayette county, Mo., at Lexington, a judgment was entered in favor of McGrew Coal Company against the Missouri Pacific Railway Company for \$14,303.77.

An appeal bond was given in that court for \$28,000 and an appeal taken to the Supreme Court of Missouri. The appellate court affirmed the judgment of the circuit court on December 22, 1919.

A writ of error was allowed by the Chief Justice of the Supreme Court of Missouri, and a bond approved, in terms of a supersedeas, in the sum of \$2,000. This bond contains the provision:

"This obligation is not intended to in any wise affect the continuing liability of the principal and sureties on a bond heretofore given in the circuit court of Lafayette county upon an appeal taken by the Missouri Pacific Railway Company to the Supreme Court of Missouri from a judgment rendered in said circuit court against said company in favor of the McGrew Coal Company, which judgment has been affirmed in said court."

The parties to the bond given on appeal from the trial court are not parties to the bond on the writ of error in this court.

Mr. Edwin A. Krauthoff, of Washington, D. C., for defendant in error.

PER CURIAM. Considering the motion to vacate the supersedeas herein, it is ordered that the plaintiff in error, within 20 days from the date of this order, furnish an additional bond in the sum of \$20,000, to be approved by the clerk of this court, and in default of compliance with this order, the supersedeas hitherto granted to be vacated as prayed.



(253 U. S. 97)

CHICAGO, M. &amp; ST. P. RY. CO. v. McCaull-Dinsmore Co.

(Argued and Submitted April 23, 1920. Decided May 17, 1920.)

No. 628.

1. STATUTES ~~§~~219—COURTS NOT BOUND BY RULING OF INTERSTATE COMMERCE COMMISSION AS TO VALIDITY OF BILL OF LADING.

Whether a provision of a bill of lading, requiring loss or damage to be measured by the value of the property at the place and time of shipment, including freight charges, violates the statute, is a question as to the meaning of the statute which the courts must decide for themselves, regardless of the determination of the Interstate Commerce Commission that the rule is reasonable.

2. CARRIERS ~~§~~158(1) — PROVISION AS TO MEASURE OF DAMAGES VOID, WHERE IT PREVENTS RECOVERY OF FULL LOSS.

A provision of a bill of lading issued in November, 1915, for an interstate shipment, requiring the amount of any loss or damage to be computed on the basis of the value of the property at the place and time of shipment, including freight charges, violates Act March 4, 1915 (Comp. St. § 8604a), making carriers liable for the full actual loss, notwithstanding any limitation of liability or of the amount of recovery, where the actual loss was more than the amount recoverable thereunder.

The Chief Justice dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

Action by the McCaull-Dinsmore Company against the Chicago, Milwaukee & St. Paul Railway Company. A judgment for plaintiff (252 Fed. 664) was affirmed by the Circuit Court of Appeals (260 Fed. 835), and defendant brings certiorari. Affirmed.

See, also, 251 U. S. 549, 40 Sup. Ct. 219, 64 L. Ed. —.

\*98

\*Mr. O. W. Dynes, of Chicago, Ill., for petitioner.

Mr. J. O. P. Wheelwright, of Minneapolis, Minn., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action for the loss of grain belonging to the plaintiff and delivered on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Nebraska. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The petitioner has paid \$1,200.48, being the amount of the loss so computed, but the value

of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was \$1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The District Court gave judgment for the plaintiff, 252 Fed. 664, and the judgment was affirmed by the Circuit Court of Appeals. 260 Fed. 835.

\*99

[1] \*The Cummins Amendment Act of March 4, 1915, c. 176, 38 Stat. 1196 (Comp. St. § 8604a), provides that the carriers affected by the Act shall issue a bill of lading and shall be liable to the lawful holder of it "for any loss, damage, or injury to such property \* \* \* and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier \* \* \* from the liability hereby imposed" and further that the carrier "shall be liable \* \* \* for the full actual loss, damage, or injury \* \* \* notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods, but merely offering the most convenient way of finding the value. *Shaffer v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law. 33 I. C. C. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves.

[2] We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the

\*100

\*question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of

a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, c. 301, 39 Stat. 441 (Comp. St. §§ 8592, 8604a) can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose but to apply specifically to this very case.

Judgment affirmed.

The Chief Justice dissents for the reasons stated by the Interstate Commerce Commission.

NOTE.—The following is the report of the Interstate Commerce Commission, as found in 33 Interst. Com. Com'n R. 633:

By the Commission:

For many years, if not, indeed, from the origin of railroad transportation in this country, common carriers by railroad have sought, by provisions in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tortfeasors for loss or damage caused by their negligence. One method was by a so-called release, executed by shipper and carrier, and intended to be effective, whether the loss or damage was due to negligence of the carrier or to other causes. The courts in different jurisdictions have differed as to the validity of such limitations and they have been the subject of legislation in some of the states.

By adoption of the Carmack Amendment, so called, to the act to regulate commerce, approved June 29, 1906, the Congress provided that a common carrier receiving property for transportation from a point in one state to a point in another state should issue a receipt or bill of lading therefor and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, or over whose lines such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. It was provided that nothing in that amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had at that time under existing law.

Since that time, beginning in 1913, with *Adams Express Co. v. Croninger*, 226 U. S. 491, the Supreme Court of the United States has decided in a number of cases, all of which followed *Hart v. P. R. R.*, 112 U. S. 331, that where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability, and in "a fair, just, and reasonable agreement" declares or agrees that the value of his shipment is a certain sum, and thereby secures a reduced transportation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss or of damage to the property, and conclusively presumed to have known the governing tariff.

On March 4, 1915, the following act, amendatory of the act to regulate commerce, and hereinafter called the Cummins Amendment, was approved:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that so much of section seven of an act entitled 'An act to amend an act entitled 'An act to regulate commerce,' approved February

fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, that it shall be



unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.'

"Sec. 2. That this act shall take effect and be in force from ninety days after its passage."

Many widely varying or diametrically opposed ideas have been expressed as to the effect of this amendment and as to what will be the lawful rates under present tariffs when it becomes effective on June 2, 1915. The commission has been urged to some expression in the premises. It has held a hearing on this subject, and the questions there discussed have been argued on briefs. From the best information it has been possible to obtain and the consideration it has been possible to give this matter within the limited time available, the commission expresses tentatively the views hereinafter indicated.

The greater part of the freight transported moves under a bill of lading, which constitutes a receipt for the property and a contract for its carriage. Efforts have been made from time to time to secure the adoption and use by all carriers of a uniform bill of lading, but no such effort has been entirely successful. Several years ago protracted effort of that kind, assisted in so far as seemed appropriate by the commission, culminated in substantial agreement among the representatives of the shippers and the representatives of the carriers, excepting those in the Southern classification territory, as to the terms and conditions of what was then styled and has since been known as the uniform bill of lading. The commission gave its tentative approval and recommended its use, and since that time it has been in use except in the Southern territory mentioned, where a somewhat different bill of lading, commonly called the standard bill of lading, has been and is in use.

The official classification, which, speaking generally, applies in the territory east of the Mississippi river and north of the Ohio and Potomac rivers, contains a rule that, except as otherwise provided, when property is transported subject to the provisions of that classification the acceptance and use of the uniform bill of lading, export bill of lading, uniform live stock contract, and certain contracts with men in charge of shipments, respectively, are required. The uniform bill of lading and the other bills of lading or contracts are set out in full in the classification.

Another rule is that in order that the consignor may have the option of shipping subject to the terms and conditions of the uniform bill of lading, or under the liability imposed upon common carriers by the common law and the federal and state statutes applicable thereto, different rates and different forms of bills of lading are provided, to be used at the election of the shipper. Under this rule, unless it is otherwise provided in the classification, property will be carried at the lower rates specified if shipped subject to all the terms and conditions of the uniform bill of lading. Property carried not subject to all the terms and conditions of the uniform bill of lading is to be carried at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states in so far as they apply, but subject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability, and in such instances a rate 10 per cent. higher, subject to a minimum increase of 1 cent per 100 pounds, will be charged. It is provided that if consignor elects not to accept all the terms and conditions of the uniform bill of lading he shall so notify the agent of the carrier at the time his property is delivered for shipment, and if he does not give such notice

it will be understood that he desires the property carried subject to the terms and conditions of the uniform bill of lading in order to secure the lower rate or, as it is termed in the classification, "the reduced rate." If the shipper notifies the agent of the initial carrier that he elects not to accept all the terms and conditions of the uniform bill of lading, the agent must print, write, or stamp upon the bill of lading a provision that in consideration of the higher rate charged the property will be carried at the carrier's liability, limited only as provided by law, but subject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability.

The Western classification, which, speaking generally, applies in all of the territory west of the Mississippi river and Lake Michigan, contains a rule that, except as otherwise provided therein, when property is transported subject to the provisions of the Western classification the acceptance and use of the uniform bill of lading is required. It also contains additional provisions substantially like those cited from the official classification. All of the terms of the uniform bill of lading are printed in the classification, but the live stock contract form does not so appear. The live stock ratings are stated to be based upon values declared by shippers, not exceeding certain stated values "under contract."

The Southern classification, which, speaking in general, applies in the territory east of the Mississippi and south of the Ohio and Potomac rivers, contains a rule that the reduced rates specified in the classification will apply only on property shipped subject to the conditions of the carrier's bill of lading, and that property carried not subject to the conditions of the carrier's bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states in so far as they apply. It provides that property thus carried will be charged 10 per cent. higher, subject to a minimum increase of 1 cent per 100 pounds, than if shipped subject to the conditions of the carrier's bill of lading. The classification does not contain the terms of the carrier's bill of lading, and, with one or two individual exceptions, the terms thereof are not filed with the commission as a tariff publication or rate schedule. The classification provides that the rates on live stock will apply when the declared value does not exceed certain values therein stated and that for each increase of 100 per cent. or fraction thereof in the declared value there shall be an increase of 20 per cent. in the rate. The classification does not contain any requirement that the live stock contract must be used, but it does provide that agents must not issue more than one live stock contract on any one shipment. Some of the tariffs of the individual carriers in this territory contain released rates applicable to shipments of live stock which are conditioned upon certain declared valuations and upon shipments being made under the live stock contract, and such tariffs provide that higher rates will apply when shipments are not so made. The terms of the live stock contract are not incorporated in the tariffs and, with one or two individual exceptions, they are not filed with the commission as a tariff publication.

It is perfectly plain that the purpose of this law is, except as otherwise provided therein, to invalidate all limitations of carrier's liability for loss, damage, or injury to property transported caused by the initial carrier or by another carrier to which it may be delivered or which may participate in transporting it. The law does not specifically say that attempts so to limit the carrier's liability shall not be resorted to, but it declares them to be invalid and unlawful wherever found and in whatever guise they may appear. Obviously, therefore, neither the bills of lading or other contracts for carriage, or classifications or rate schedules of the carriers, should contain any provisions which are so declared to be unlawful and void.

Some of the carriers insist that if no changes are

made in their classifications and other tariff publications the lower rates, which are conditioned upon the use of the bills of lading now in use, will be automatically canceled and the higher rates, based upon the carrier's liability, will be the only lawful rates from and after the date upon which the law in question becomes effective. Some of the shippers insist that if no changes are made in the classifications or tariff publications, the provisions for limitation of carrier's liability will, when the new law becomes effective, be unlawful and void, and the carriers will thereupon have two sets of rates, both applicable under like conditions, and that of the two shippers will be entitled to the lower.

The official classification roads have announced the purpose of making certain changes in the terms of their bill of lading, other contracts of carriage, and classification and rate schedules, in the light of the provisions of the new law. They say that whether or not they will continue to maintain rates based upon the value of the property is a matter for further consideration by their traffic officers. They express the opinion that certain of these changes will impose upon them liabilities not heretofore borne and consequent loss of revenue, and reserve the right to assert at the proper time a claim for some increase in rates on account thereof.

The Southern lines announced their purpose of making certain changes in their contracts, classification, and rate schedules which would exempt certain heavy commodities moving in large quantities and said to constitute about 70 per cent. of their traffic from any immediate increases in rates on account of the amended law, and to incorporate in the classification a provision that as to the remainder of the traffic the rates contained in schedules governed by the classification would be increased 5 per cent. upon the date when the new law becomes effective. That method of changing rates would be in direct opposition to the commission's regulations governing the construction of tariffs, which are by the act given full force of law. The Southern lines urge that the new law will produce conditions which furnish substantial reasons for allowing them additional revenue, and that it is physically impossible, except by the method which they propose, to issue any tariff publications prior to June 2 which will secure that additional revenue. They say that the tariff regulations are prescribed by the commission, and that it is within its power to modify them at any time, and therefore the question of whether or not the carriers should be permitted to make effective the proposed plan is wholly within the commission's discretion to determine. They argue that if nothing is done the 10 per cent. higher rates will automatically become effective, which they do not desire, and that the course proposed by them is the only alternative to the injustice of their being compelled to sustain the burdens imposed by the new legislation without means for recouping the losses which they will suffer.

The commission has made no investigation upon which a judgment as to the cost of and proper compensation for additional risk could be based. The commission has no right to assume that it would be 5 per cent. of the rates upon 30 per cent. of the carriers' traffic, or that it would be any given per cent. upon all of the traffic. Obviously there can be no propriety in attaching to one commodity unreasonable rates for the purpose of compensating a carrier for a risk attaching to it in the transportation of another commodity, and it is admitted that the carriers cannot make any accurate statement in advance as to the added cost, if any, of the increased liability.

With regard to rates on shipments of live stock, the Southern carriers announced at the hearing their purpose to provide that the present rates would apply on shipments declared to be of value not exceeding that now stated as limitation of the carrier's liability, and to increase the rates 20 per cent. for each 100 per cent. increase in the declared value of the live stock. By letter submitted since the hearing they announce the purpose to provide for an increase of 5 per cent. in the rate for each increase

of 100 per cent., or fraction thereof, in the declared value.

By a still later letter the Southern classification roads advise that, in view of the numerous and irreconcilable complications which have developed, and in order to remove all doubt as to the continuance of existing rates after the amendment to the law becomes effective, they have decided to supersede their present classification rule by one which will recite that the rates governed by the classification will apply only on property shipped subject to the conditions of the carrier's bill of lading in use on and after the effective date of the amended law, and, except as otherwise provided in the classification, all interstate rates in effect on June 2, 1915, will continue in force, disregarding provisions in tariffs, classifications, and exception sheets which limit the liability of carriers, and to continue a provision that property carried not subject to the terms and conditions of the carriers' bill of lading will be at carriers' liability, limited only by the common law and the laws of the United States and of the several states, in so far as they may apply, and property so carried will be subject to rates 10 per cent. higher than those shown in the tariffs.

The Western classification roads, in the main, take a position substantially like that taken by the official classification roads. Their representatives expressed to the committees of Congress the view that the enactment of the amendment in question would, by striking from the uniform bill of lading vital provisions, automatically throw the roads back upon their common-law liability and the increased rates. They admit that a 10 per cent. increase in rates cannot be justified. They think that the increased liability will justify some increase in rates, but emphatically disclaim any disposition to take advantage of a technical opportunity to mulct the shipping public. They are of opinion that they still have the right to provide rates upon live stock dependent upon the declared value of the stock, and that a shipper who misstates the true value of his shipment is guilty of violation of section 10 of the act, just as he would be if he misstated the commodity shipped. They suggest that their present rule, which provides in general for an increase of 10 per cent. in the rate for each 100 per cent. of increase in the declared valuation, is probably too high; that an increase of 5 per cent. in the rate for each 100 per cent. increase in the value, or of 3 per cent. in the rate for each increase of 50 per cent. in the value, would be a more equitable rule, and that this question is involved in a case soon to be submitted to the commission. They, like the Eastern roads, have numerous commodity rates based upon valuation, and they think they may lawfully continue that practice. They have, however, not had opportunity since this bill was enacted to formulate in detail the changes which they think necessary and proper.

From the best information that can be gathered from testimony that has been submitted in various cases, it appears that prior to 1913 the limited liability provisions contained in the shipping contracts, classifications, and rate schedules were very generally disregarded in the settlement of loss and damage claims, especially in the Western classification territory. It seems, therefore, that to a very large extent at least, despite the limitations of liability stated in the contracts and schedules, full value was quite generally recognized in the settlement of claims. After the Supreme Court decided the Croninger Case, supra, in 1913, the provisions of the contracts and rate schedules in this and other particulars were recognized as lawfully binding upon carriers and shippers alike, and the policy followed was correspondingly changed. It is pointed out that prior to 1906 many of these limitations of liability were not contained in the shipping contracts and rate schedules; that in 1906 they were incorporated therein, but were largely ignored until 1913; that in 1913 the policy was generally adopted of endeavoring to enforce the limited liability provisions; and that neither in 1906 nor in 1913 was any change in the rates undertaken because of the limited lia-



bility. It is argued that, inasmuch as no reduction in rates was made when the limited liability provisions were established, or when they were sustained as lawful by the Supreme Court of the United States, there is no justification for an increase in rates now that the liability conditions are restored to substantially what they were prior to 1906. Limitations of liability have been incorporated in live stock shipment contracts for many years, but, as has been said, it appears that at least in the territory where there is the greatest movement of live stock those limitations were generally disregarded in settlement of claims.

The so-called uniform bill of lading, which has been in use in official and Western classification territories, contains, and has contained, a provision that claims for loss or damage must be presented to the carrier within four months, but until the Croninger Case, supra, was decided by the Supreme Court, no effort was made by the carriers generally to enforce or to observe that provision. After the Croninger Case was decided the carriers adopted an entirely different course, and took the position that this provision was in the bill of lading, the terms of the bill of lading were in the rate schedules, and therefore it was unlawful to depart from that requirement. This created a general controversy, and the sudden change from ignoring a rule to literally enforcing it necessarily created multitudes of unjust discriminations. The question was presented to and considered by the commission, and as the fair and only means of composing the situation and avoiding endless controversy and litigation the commission issued its report. In the Matter of Bills of Lading, 29 I. C. C. 417.

The Cummins Amendment makes it unlawful for the carrier to fix a period for giving notice of claims shorter than 90 days, for the filing of claims shorter than 4 months, and for the institution of suits shorter than 2 years. The law does not indicate the time or date from which these several periods of time shall be computed; that is, whether from the date of delivery by the carrier of the damaged property, or, in case of loss, after a reasonable time for delivery has elapsed, from the date shown on the bill of lading, or from the occurrence of the loss or of the damage. It seems clear that these provisions are, in common with the other matters governed by the amendment, confined to instances of loss, damage, or injury caused by the carriers. It will be necessary for the carriers to determine what periods of time they will fix for giving notice of claims, the filing of claims, and the institution of suits. The dates or times from which such periods shall run should also be fixed in the rules. In the interest of thorough understandings and to avoid controversies, it is very desirable that these rules be uniform for all the carriers of the country.

It is to be remembered that the Cummins Amendment is not a separate statute, but is an amendment to the act. It must therefore be construed as a part of, and in connection with other portions of, the act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the act other than that part known as the Carmack Amendment. The new amendment should, if possible, be so construed as to give full force to its clear purpose, without impairing the effect of any other provision of the act.

The more important points, which seem to be surrounded with the most doubt and upon which opinions so far expressed most sharply conflict, are:

1. If no changes are made in the existing shipping contracts and rate schedules, will the higher rates provided therein automatically become lawfully applicable upon the date upon which the amendment takes effect?

As we have seen, the Carmack Amendment, adopted in 1906, provided that no contract, receipt, rule, or regulation should exempt the carrier from the liability thereby imposed. As has been said, no effort was made to change rates because of that amendment to the act. The classifications or rate schedules provide that unless the terms of

certain bills of lading are accepted higher rates will apply. The terms of the bill of lading could be modified or changed to any extent without automatically changing any rate. Prior to 1913 many of the limitations contained in bills of lading or other shipping contracts were treated as if they did not exist, and it was never suggested that the validity or invalidity of any such provision affected the rate.

It is contrary to all canons of construction to hold that an act of Congress produces a result not intended by Congress unless the express language of the act compels such a construction. There is nothing in the expressed terms of this act, or in the history of this legislation, that shows any intent or purpose on the part of Congress to affect in any degree the existing rates charged by carriers for transporting property. The legislation is aimed at specified contracts and declares them to be unlawful. The lawful rates on file at this time, therefore, are the rates providing for the limited liability. The Cummins Amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10 per cent. increased rates are merely additional and cannot stand in and of themselves.

Applying correct rules of interpretation, the Cummins Amendment does not automatically bring into effect the increased rates named in the classifications and tariff publications as applicable to shipments which are not made subject to the terms of the uniform or carrier's bill of lading.

2. May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?

It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation, with its attendant labor and expense, and avoid unjust discriminations.

The Cummins Amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.

3. Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States?

This must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States.

4. In the proviso, "that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods," what is the proper interpretation to

be placed upon the words "and the carrier is not notified as to the character of the goods"?

Some argue that the word "character" means nothing more than a statement of the ordinary name by which the commodity is known. On the other hand, it is urged that knowledge as to what the commodity is is necessary in order to apply to it any transportation rate, and that therefore the word "character" properly means more than the mere name of the commodity. It has been suggested that the real and proper meaning would be indicated by recasting the language as follows:

"Provided, however, that if a commodity in the course of transportation is hidden from view by wrapping, boxing, or other means, so that the carrier cannot know its character, that is to say, its grade, quality, and condition, it may, with the approval of the commission, publish and maintain rates based on value and require the shipper to state in writing the value of any shipment made, and beyond the value so stated the carrier shall not be liable."

It has also been suggested that, in view of the fact that the articles dealt with in this proviso are to be distinguished on the basis of value, the value becomes a peculiar quality of the property, and the word "character" should be construed as including value, and that when the shipper notifies the carrier of the character of the goods the notice is incomplete, unless the value is stated as a necessary element in pointing out the character of the goods.

Another suggestion is that when common experience or knowledge does not clearly establish the nature of the goods, or the view is hidden by boxing, wrapping, or other means, and the carrier is not notified as to the true character of the goods, it may exercise the right to require the shipper to state in writing the value of the property.

The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof or the rate applicable thereto has not been denied by the act or withdrawn by this amendment. The right in certain instances to make varying rates upon a given article or commodity dependent upon its true value being recognized, and it being impossible for the carrier's agent to know the true value of the shipment unless it is declared by the shipper, and in view of the fact that the ordinary name of the commodity is essential to the application of any transportation rate whatsoever, it seems that the word "character" as used in this proviso must include the true and actual value as stated by the shipper.

The word "character" as here used clearly relates primarily to value, or to those qualities affecting value, and when the entire proviso is considered the meaning seems to be that if the qualities affecting value of the goods are hidden from the carrier's view, or are not known to the carrier, the proviso applies. It is a well-settled rule of statutory construction that the word "and" may be read as "or" in deference to the meaning of the context.

If the word "and" in the proviso is read as "or," the meaning is reasonably clear; whereas, if the letter of the statute is adhered to, the meaning is doubtful and difficult to determine. In those instances in which the carrier desires to limit its liability to the value of the property as specifically stated in writing by the shipper, the rate must be based upon the declared value and be so published; but the commission apparently must determine in advance of such publication that the commodity is one the value of which cannot be known to the carrier from ordinary sources or reasonable inspection, and to which rates based on declared value may be applied in connection with which the carrier's liability is limited to the value so declared.

In determining that question the inquiry is whether or not the commodity is one the value of which is peculiarly within the knowledge of the shipper. If it has a definite market value, or its value depends upon facts of which the carrier has equal knowledge with the shipper, the "character"

of the shipment is known to the carrier, and the proviso does not apply. The Congress did not affirmatively recognize any rates based upon declared value other than those authorized by this proviso. This, of course, does not mean that commodities may not be reasonably classified according to value and be subject to different rates applicable to different grades of the same commodity, which is a different matter from limiting the liability to the declared value.

When the goods are not hidden from view, and the carrier is advised as to their character, all contracts or agreements purporting to limit the liability of the carrier for loss or damage caused by it are made void. A carrier, after the Cummins Amendment goes into effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause. It follows further that the rates provided by such tariff may be proportionate to the risk assumed.

This provision of the statute as to goods concealed from view and of the character of which the carrier is not advised clearly prescribes the right of carriers under the direction or approval of the commission to provide for a graduation of rates in accordance with the declared value of the property transported. The liability provided by the rates so established by the commission is applicable no less to instances of loss or damage chargeable to the negligence of the carrier than to those occasioned by causes beyond the carrier's control. But the carriers may not contract to limit their liability for loss, damage, or injury caused by them to property the character of which is manifested by the shipment itself or otherwise disclosed.

In this connection it has been suggested that the carrier might provide that in the event the shipper refused to declare the value the higher rates would apply. This suggestion cannot be approved. If the rate is lawfully conditioned upon the value as declared by the shipper, it is as much the shipper's duty to declare the true value of the shipment as it is his duty to declare the name of a commodity tendered for shipment as to which there are no different rates.

It is important to keep in mind that the carriers are not prohibited from making different rates dependent upon the value of different grades of a given commodity; that, except as covered by the Cummins Amendment, including approval of the rates by the commission, the carrier is subject to all of the liabilities imposed by that amendment; and that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates, and is subject to the penalty prescribed in, section 10 of the act. The carrier would also be subject to the same penalty in such a case if, having knowledge that the value represented is not the true value, it nevertheless accepts the shipper's representation as to value for the purpose of applying the rate.

5. Do the terms of the Cummins Amendment apply to the transportation of baggage?

This must apparently be answered in the affirmative. Transportation of baggage is a part of the contract for transportation of the passenger. The carriers have always limited their liability for loss of or damage to baggage. The baggage check is



the carrier's receipt for the baggage. The conditions attached to the carrier's liability are stated in the fare schedules and on passage tickets of contract form. In *National Baggage Committee v. A., T. & S. F. Ry. Co.*, 32 I. C. C. 152, the commission considered the carriers' rules relative to charges and liabilities in the transportation of baggage and prescribed certain reasonable regulations, including reasonable insurance charges upon baggage declared to be of greater value than the maximum limit provided in the schedules and contract for carriage. All ordinary personal or sample baggage is hidden from view by boxing, wrapping, or other means, and the amended law seems clearly to recognize the carrier's right to fix conditions and terms applicable to the transportation of baggage dependent upon the value as declared by the person offering the baggage for transportation.

The necessity for revision of the bills of lading, live stock contracts, and other similar contracts of carriage, as well as of certain parts of the carriers' classifications and rate schedules, is manifest. Bills of lading and shipping contracts can and ought to be at once amended by eliminating obviously unlawful and invalid provisions. Such action will obviate for the immediate future numerous controversies that otherwise would properly arise. Proper analysis should be made of the classifications and tariffs to bring them into harmony with the amended law.

Such changes in classifications and rate schedules cannot be made upon statutory notice and become effective contemporaneously with the new law. Permission is therefore hereby given to carriers to make effective on June 2, 1915, upon not less than three days' notice to the public and to the commission, given in the manner prescribed in the act and in the commission's regulations, amendments to the classifications and rate schedules which eliminate provisions or rules that are in conflict with the terms of the new law, provided no such amendment has the effect of increasing any rate or charge for services.

If, in a proper manner and a proper proceeding, it shall be made to appear that, with regard to any commodity or commodities, the existing rates do not afford the carriers proper compensation for the services they perform and the risk which is imposed upon them, it could hardly be denied that the rates on such commodities might properly be increased in a sufficient amount to properly compensate the carriers for their added risk and liability. Where rates are lawfully based upon declared values, the difference in rates should be no more than fairly and reasonably represents the added insurance. It does not appear that this amendment to the act affords justification for any increase in rates on commodities in general. As has been said, the carrier may not lawfully impose unreasonable rates upon one commodity in order to compensate it for risk or liabilities incurred in connection with the transportation of another commodity, and it is not to be forgotten that the liabilities here considered are only those for loss, damage, or injury to the property caused by a carrier or its agents or employees; in other words, the loss, damage, or injury resulting from the neglects or omissions of a carrier or its agents.

The commission has been conducting an investigation with regard to bills of lading, entitled in the Matter of Bills of Lading, Docket No. 4844. Further hearings in that proceeding may be necessary in the light of the Cummins Amendment. In that connection matters that have been informally presented and urged in this informal proceeding may be presented in a formal way, supported by testimony, and a determination can there be reached on questions as to which the commission now has no information upon which it could base a lawful order. What is attempted here is simply to indicate the impressions gained from the experience had in the past and from the suggestions informally presented by those who are vitally interested in the effect of the Cummins Amendment

and the course to be pursued for the immediate future in the light thereof. All of the questions herein discussed are, of course, subject to judicial interpretation, and the views indicated herein might be somewhat changed in the light of more complete information supported by competent evidence.

The classification, tariffs, receipt and other forms used by the express companies have been prescribed by order of the commission. The new law, of course, applies to them as well as to other carriers. They have presented suggested changes in their rules and forms which will be disposed of by a supplemental order in the Express Case.

(253 U. S. 217)

**LE CRONE v. McADOO**, Secretary of the Treasury.

(Submitted April 26, 1920. Decided June 1, 1920.)

No. 304.

1. APPEAL AND ERROR  $\hookrightarrow$  781(5)—WRIT OF ERROR DISMISSED FOR FAILURE TO SUBSTITUTE SUCCESSOR IN OFFICE OF ORIGINAL DEFENDANT.

A writ of error to a judgment denying petition for mandamus against the Secretary of the Treasury must be dismissed where the original respondent had resigned his office and his successor was not substituted within 12 months, as required by Act Feb. 8, 1899 (Comp. St. § 1594).

2. MANDAMUS  $\hookrightarrow$  177 — JURISDICTION TO AWARD DAMAGES LOST WHEN RIGHT TO WRIT IS LOST.

The right to recover damages in mandamus proceedings under Code of Law D. C. 1901, § 1278, is incident to the allowance of the writ of mandamus; and, where that cannot be allowed because of failure to substitute the successor in office of the original respondent, the whole proceeding is at an end.

In Error to the Court of Appeals of the District of Columbia.

Petition for mandamus by John W. Le Crone, as Receiver of the Orinoco Company, Limited, against William G. McAdoo, Secretary of the Treasury. A judgment of the Supreme Court of the District of Columbia dismissing the petition was affirmed by the Court of Appeals (48 App. D. C. 181), and petitioner brings error. Writ of error dismissed.

Mr. George N. Baxter, of Cincinnati, Ohio, for plaintiff in error.

Mr. Solicitor General King, for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

[1, 2] This is a petition to the Supreme Court of the District of Columbia for mandamus to direct the Secretary of the Treasury to pay the amount of two certificates issued

to the petitioner by the Secretary of State. The petitioner is receiver of the Orinoco Company, Limited. That Company had claims for damages against the United States of Venezuela, which, with others, by agreement

\*218

\*between the two governments, the United States of America released upon receiving from the United States of Venezuela a certain sum in trust for the parties having the claims. By the Act of February 27, 1896, c. 34, 29 Stat. 32 (Comp. St. § 6668), moneys so received are to be paid into the Treasury and the Secretary of State is to "determine the amounts due claimants, respectively, \* \* \* and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due." Each of such trust funds is declared to be "appropriated for the payment to the ascertained beneficiaries thereof of the certificates" provided for. The answer alleged that there were pending in the same Supreme Court two bills in equity, one by a private person and one by the Orinoco Company, Limited, asserting claims to the fund, that the respondent and petitioner both are parties to those proceedings, the petitioner having submitted to the jurisdiction, and that the petitioner should be limited to those proceedings and await the result of the decrees. The petitioner demurred. The demurrer was overruled and the petition was dismissed by the Supreme Court and its judgment was affirmed by the Court of Appeals.

The theory of the answer seems to be that the purpose of the Act of Congress was to appropriate a fund to the claim and to transfer the claim to that fund, leaving the question of title open to litigation in the ordinary courts, as has been held in more or less similar cases. *Butler v. Goreley*, 146 U. S. 308, 309, 310, 13 Sup. Ct. 84, 36 L. Ed. 981; *Id.*, 147 Mass. 8, 12, 16 N. E. 734; *United States v. Dalcour*, 203 U. S. 408, 422, 27 Sup. Ct. 58, 51 L. Ed. 248; *Robertson v. Gordon*, 226 U. S. 311, 317, 33 Sup. Ct. 105, 57 L. Ed. 236. See, also, *Bayard v. White*, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116. It is thought that Congress hardly can have sought to confer judicial powers upon the Secretary of State. *United States v. Borchering*, 185 U. S. 223, 234, 22 Sup. Ct. 607, 46 L. Ed. 884. And as the certificates are not gifts but are in recognition of outstanding claims, *Williams v.*

\*219

*Heard*, \*140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550, reversing s. c., 146 Mass. 545, 16 N. E. 437, judicial action is supposed to be necessary for the final determination of the right. But we cannot consider that question or the other arguments upon the merits of the case, because, Mr. McAdoo having resigned the office

of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, c. 121, 30 Stat. 822 (Comp. St. § 1594). It is said that the Code of the District of Columbia, § 1278, allows the petitioner to recover damages in the same proceeding and that the petition should be retained to charge Mr. McAdoo personally. But apart from other questions the damages are only incident to the allowance of the writ of mandamus, and as that cannot be allowed the whole proceeding is at an end. See *Pullman Co. v. Knott*, 243 U. S. 447, 451, 37 Sup. Ct. 428, 61 L. Ed. 841; *Pullman Co. v. Croom*, 231 U. S. 571, 577, 34 Sup. Ct. 182, 58 L. Ed. 375.

Writ of error dismissed.

(253 U. S. 219)

# CITY OF NEW YORK v. CONSOLIDATED GAS CO. OF NEW YORK et al.

(Argued April 22, 1920. Decided June 1, 1920.)

No. 566.

## 1. APPEAL AND ERROR 78(2), 87(3)—ORDER DENYING PETITION TO INTERVENE IS NOT APPEALABLE.

An application by a city for leave to intervene in the suit by a gas company to restrain the enforcement of a gas rate is addressed to the discretion of the court, and an order denying it is not a final order, which furnishes the basis for appeal.

## 2. COURTS 382(5)—FINAL ORDER IN CIRCUIT COURT OF APPEALS IN CASE NOT WITHIN ITS JURISDICTION CAN BE REVERSED.

Where the Circuit Court of Appeals affirmed an order which was not appealable in a suit in which the jurisdiction of the District Court depended solely on a claimed violation of the rights of plaintiff under the United States Constitution, so that the Supreme Court alone had appellate jurisdiction thereof, the Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals, under Judicial Code, § 241 (Comp. St. § 1218) and will reverse that judgment and remand the case to that court, with directions to dismiss the appeal.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by the Consolidated Gas Company of New York against Charles D. Newton, Attorney General, and others, to enjoin the enforcement of the 80-cent gas law. The order of the District Court, denying application of the City of New York to intervene (256 F. 238), was affirmed by the Circuit Court of Appeals (260 F. 1022), and the City of New York appeals. Reversed and remanded to Circuit Court of Appeals, with directions to dismiss the appeal.



See, also, 250 U. S. 671, 40 Sup. Ct. 15, 63 L. Ed. 1199.

\*220

\*Mr. Vincent Victory, of New York City, for appellant.

Mr. John A. Garver, of New York City, for appellees.

Memorandum opinion by direction of the Court by Mr. Justice DAY.

The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York 80-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory and hence violated constitutional rights of the company. The city of New York applied for leave to intervene as a party defendant in the action. The District Judge denied the petition for intervention, stating that the Public Service Commission, the Attorney General, and the district attorney properly represented private consumers; that the city had no interest in the litigation as a consumer, was not the governmental body which had fixed the rate, and was not charged with the duty of enforcing it. From the order (Consolidated Gas Co. of New York v. Newton, 256 Fed. 238) denying the application to intervene, the city of New York prosecuted an appeal to the Circuit

\*221

Court of Appeals, and the latter court (260 Fed. 1022) affirmed the order of the District Court.

[1, 2] The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal. Ex parte Cutting, 94 U. S. 14, 22, 24 L. Ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 315, 20 Sup. Ct. 636, 44 L. Ed. 782; Ex parte in the Matter of Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 32 Sup. Ct. 833, 56 L. Ed. 323. As the jurisdiction of the District Court was based upon constitutional grounds only, the case was not appealable to the Circuit Court of Appeals. But, an appeal having been taken and a final order made in the Circuit Court of Appeals, we have jurisdiction to review the question of jurisdiction of that court. Judicial Code, § 241 (Comp. St. § 1218); Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712.

The proper course is to reverse the judgment of the Circuit Court of Appeals, and remand the case to that court, with directions to dismiss the appeal. Four Hundred and Forty-Three Cans of Egg Product v. United States, 226 U. S. 172, 184, 33 Sup. Ct. 50, 57 L. Ed. 174; Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658.

So ordered.

(253 U. S. 284)

PHILADELPHIA & R. RY. CO. v. HANCOCK.

(Argued March 2, 1920. Decided June 1, 1920.)

No. 415.

1. MASTER AND SERVANT ⇨365—COMPENSATION FOR INJURY IN INTERSTATE COMMERCE IMPROPER.

A judgment affirming an award under the Pennsylvania Workmen's Compensation Act, for the death of a railroad trainman must be reversed, if decedent was employed in commerce between the states when the accident occurred.

2. COMMERCE ⇨27(6)—TRAINMAN EMPLOYED IN "INTERSTATE COMMERCE," IF ANY CAR CONTAINED INTERSTATE FREIGHT.

Under Employers' Liability Act (Comp. St. §§ 8657-8665), a railway trainman was employed in "interstate commerce," if any of the cars in his train contained interstate freight.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COMMERCE ⇨27(6)—RAILWAY TRAINMAN ENGAGED IN INTERSTATE COMMERCE, THOUGH CARS NOT BILLED WHEN HANDLED BY HIM.

A railway trainman, belonging to a crew operating a train of loaded cars from a colliery to yards 2 miles away, was engaged in interstate commerce, where the ultimate destination of some of the cars was outside the state, as appeared from the instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine, and freight charges were paid for the entire distance, beginning at the mine, though the cars were not weighed and billed to the consignee until another crew moved them from such yard to scales some 10 miles away, where they were inspected, weighed, and billed.

Mr. Justice Clarke dissenting.

On Writ of Error and Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Proceedings under the Workmen's Compensation Act of Pennsylvania by Margaret L. Hancock for compensation for the death of her husband, opposed by the Philadelphia & Reading Railway Company, employer. Compensation was awarded, and the award affirmed by the Supreme Court of Pennsylvania (264 Pa. 220, 107 Atl. 735), and the employer brings error and certiorari. Writ of petition dismissed, judgment reversed, and cause remanded.

See, also, 250 U. S. 658, 40 S. Ct. 54, 63 L. Ed. 1193.

Messrs. George Gowen Parry and Charles Heebner, both of Philadelphia, Pa., for plaintiff in error.

Mr. Hannis Taylor, of Washington, D. C., for defendant in error.

\*285

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The judgment below affirmed an award for respondent under the Workmen's Compensation Act of Pennsylvania (Act June 2, 1915 [P. L. 736]), granted because of the death of her husband from an accident while in the petitioner's employ as a trainman.

After a writ of error had been sued out we allowed a writ of certiorari. 250 U. S. 658, 40 Sup. Ct. 54, 63 L. Ed. 1193. The former must be dismissed; the case is properly here upon the latter.

[1, 2] If, when the accident occurred, the husband was employed in commerce between states, the challenged judgment must be reversed, and he was so employed if any of the cars in his train contained interstate freight. Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665); *St. L., S. F. & Tex. Ry. v. Seale*, 229 U. S. 156, 161, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *New York Central & Hudson River R. R. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; *New York Central R. R. Co. v. Porter*, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; *Southern Pacific Co. v. Industrial Accident Commission* (January 5, 1920) 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. —.

[3] The essential facts are not in controversy; the nature of the employment, therefore, is a question of law.

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap colliery to Locust Summit yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the state.

Pursuing the ordinary course these cars

\*286

were hauled to \*Locust Summit yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some 10 miles to Shamokin scales, where they were inspected, weighed, and billed to specifically designated consignees in another state. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another state when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another state. *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 124, 126, 33 Sup. Ct. 229, 57 L. Ed. 442; *Railroad Commission of Louisiana v. Texas & Pacific R. R. Co.*, 229 U. S. 336, 341, 33 Sup. Ct. 837, 57 L. Ed. 1215; *Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 34 Sup. Ct. 641, 58 L. Ed. 1055.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice CLARKE dissents.

(253 U. S. 209)

UNITED STATES ex rel. JOHNSON et al. v. PAYNE, Secretary of Interior.

(Argued April 29, 1920. Decided June 1, 1920.)

No. 291.

1. INDIANS ⇐13—SECRETARY OF INTERIOR AUTHORIZED TO REVERSE DECISION GRANTING ENROLLMENT.

Under Act April 26, 1906, § 2, the Secretary of the Interior had power, after informing the Commissioner to the Five Civilized Tribes that his decision granting enrollment as members of the Creek Nation to certain applicants was affirmed, to reverse his decision and deny enrollment, where the names had never been placed on the rolls.

2. MANDAMUS ⇐73(1) — WILL NOT LIE TO COMPEL PLACING OF NAMES ON ROLLS OF INDIAN TRIBE.

Under Act April 26, 1906, § 2, the Secretary of the Interior was the final judge whether names should be placed on the rolls of members of the Creek Nation, and where he denied enrollment the names cannot be ordered put on the rolls, in a mandamus proceeding, upon a suggestion that he made a mistake, or that he came very near to granting enrollment.

In Error to the Court of Appeals of the District of Columbia.



Mandamus proceeding by the United States, on relation of Jennie Johnson and others, against John Barton Payne, Secretary of the Interior. A judgment dismissing the petition was affirmed by the Court of Appeals of the District of Columbia (48 App. D. C. 169), and the relators bring error. Affirmed.

\*210

\*Mr. Charles H. Merillat, of Washington, D. C., for plaintiffs in error.

Messrs. Assistant Attorney General Nebecker, Charles D. Mahaffie, and C. Edward Wright, all of Washington, D. C., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition for a writ of mandamus to require the Secretary of the Interior to place the names of the petitioners upon the rolls of the members of the Creek Nation. The petition was dismissed by the Supreme Court of the District of Columbia and the judgment was affirmed by the Court of Appeals. We are not called upon to consider the antecedent facts of the petitioners' case as all that is material can be stated in a few words. Rights as a member of the Nation depend upon the approved rolls. March 4, 1907, was fixed by statute as the time when the rolls were to be completed by the Secretary of the Interior and his previously existing jurisdiction to approve enrollment then ceased. Act of April 26, 1906, c. 1876, § 2, 34 Stat. 137, 138. Before that date the petitioners had on file an application for enrollment, hearings had been had before the proper tribunal, a favorable report had been made to the Secretary and the Secretary had written a letter to the Commissioner to the Five Civilized Tribes, saying, "Your decision is hereby affirmed." But on the last day, March 4, 1907, the Secretary addressed another communication to the same official rescinding the

\*211

former letter to \*him, and reversing his decision. It was ordered that if the petitioners' names were on the rolls they should be stricken off. The Secretary gave no reasons for his action but it is suggested that he acted under mistakes of law and fact, and it is argued that when the first letter was written the petitioners' rights were fixed.

[1, 2] The last is the only point in the case and with regard to that it is argued that this reversal of the first decision without a hearing was a denial of due process of law. It is not denied that the Secretary might have declined to affirm the decision below in the first instance, and that having been his power, the only question is when it came to an end. While the case was before him he was free to change his mind, and he might do so none the less that he had stated an opinion in favor of one side or the other. He did

not lose his power to do the conclusive act, ordering and approving an enrollment, *Garfield v. Goldsby*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, until the act was done. *New Orleans v. Paine*, 147 U. S. 261, 266, 13 Sup. Ct. 303, 37 L. Ed. 162; *Kirk v. Olson*, 245 U. S. 225, 228, 38 Sup. Ct. 114, 62 L. Ed. 256. The petitioners' names never were on the rolls. The Secretary was the final judge whether they should be, and they cannot be ordered to be put on now, upon a suggestion that the Secretary made a mistake or that he came very near to giving the petitioners the rights they claim.

Judgment affirmed.

(253 U. S. 212)

# FIDELITY TITLE & TRUST CO. v. DU-BOIS ELECTRIC CO.

(Argued March 25 and 26, 1920. Decided June 1, 1920.)

No. 300.

## 1. JURY $\Rightarrow$ 37 — ON REVERSAL OF JUDGMENT FOR PLAINTIFF NEW TRIAL SHOULD BE GRANTED.

On reversing a judgment for plaintiff in an action for personal injury entered on a verdict, the Circuit Court of Appeals should have ordered a new trial.

## 2. MUNICIPAL CORPORATIONS $\Rightarrow$ 809(1) — PARTY SUSPENDING BANNER ABOVE STREET LIABLE TO TRAVELER, NOTWITHSTANDING ABSENCE OF CONTRACT.

A party suspending a political banner over a street by means of a wire cable fastened to a chimney, which was pulled down by the cable during a storm, was not relieved of liability to a traveler on the street injured by a falling brick because of the absence of any contract with him.

## 3. MUNICIPAL CORPORATIONS $\Rightarrow$ 809(1) — PARTY SUSPENDING BANNER OVER STREET CANNOT ESCAPE LIABILITY BY RELEASING CONTROL.

A party suspending a political banner over a street by means of a wire cable attached to a chimney, which was pulled down by the cable during a storm, under a contract with another party, could not escape liability for injury from falling brick by stepping out of control a few days before the accident; the danger having been called fully into existence by it.

## 4. MUNICIPAL CORPORATIONS $\Rightarrow$ 821(18) — PARTY SUSPENDING A BANNER OVER STREET HELD NOT TO HAVE SURRENDERED CONTROL AS MATTER OF LAW.

Where defendant suspended a banner above a street by means of a wire cable attached to a chimney on a hotel building, and handled the banner whenever it wanted to, and no one else touched it, and the party employing defendant to suspend the banner testified that he asked defendant to put it up and take it down and said he did not want to have anything to

do with it, it could not be said as a matter of law that defendant had stepped out of control of the banner prior to an accident.

5. MUNICIPAL CORPORATIONS ⚡822(2) — IN ACTION FOR INJURIES FROM FALLING CHIMNEY, INSTRUCTION HELD TOO FAVORABLE TO DEFENDANT.

In an action for injuries from the falling of brick from a chimney to which defendant attached a wire cable supporting a banner suspended over the street, under contract with a third party, an instruction that, even if the fall was due to negligence in putting up the banner, defendant would not be liable unless by arrangement it assumed a continuing duty to maintain the banner in a safe condition, *held* more favorable to defendant than it was entitled to.

6. LIMITATION OF ACTIONS ⚡127(5)—ORIGINAL DECLARATION SUFFICIENT, AND AMENDMENT DID NOT CHANGE CAUSE OF ACTION.

Where the original declaration alleged negligence in fastening a cable suspending a political banner to a chimney, and alleged that the fall of the chimney was due to such use, it was sufficient, and an amendment after the statute of limitations had run, alleging also that defendant maintained the banner, did not change the cause of action.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by Vernon W. Pancoast against the Dubois Electric Company, which was continued by the Fidelity Title & Trust Company, ancillary administrator of the deceased plaintiff. A judgment for plaintiff was reversed by the Circuit Court of Appeals for the Third Circuit without ordering a new trial (253 Fed. 987, 165 C. C. A. 668), and plaintiff brings certiorari. Reversed, and judgment of the District Court affirmed.

Messrs. Charles Alvin Jones and M. W. Acheson, Jr., both of Pittsburgh, Pa., for petitioner.

Mr. W. C. Miller, of Clearfield, Pa., for respondent.

\*213

\*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is an action begun by Pancoast, to recover for personal injuries, and continued after his death by the petitioner as ancillary administrator. At a former trial the plaintiff had a verdict but it was set aside and a new trial ordered by the Circuit Court of Appeals. *Du Bois Electric Co. v. Fidelity Title & Trust Co.*, 238 Fed. 129, 132, 151 C. C. A. 205, L. R. A. 1917C, 907. At the new trial the plaintiff again got a verdict and judgment, but the Circuit Court of Appeals set them aside, this time simply reversing the judgment without ordering a new trial. 253 Fed. 987, 165 C. C. A. 668. An opportunity was allowed to that Court to

correct the error and as it was not corrected the present writ of certiorari was granted. 249 U. S. 606, 39 Sup. Ct. 290, 63 L. Ed. 799; *Id.*, 249 U. S. 597, 39 Sup. Ct. 388, 63 L. Ed. 795. Of course if the judgment of the Circuit Court of Appeals was right on the merits a new trial should have been ordered. *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029; *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184, 189, 34 Sup. Ct. 559, 58 L. Ed. 906. But as it has been necessary to direct the record to be certified up, it is necessary also to consider the merits of the case and to determine whether the Circuit Court of Appeals was right with regard to them.

Nothing turns upon the form of the pleadings. The evidence for the plaintiff was in conflict with that for the defendant upon important points, but we shall state the case as the jury might have found it to be if they believed the plaintiff's evidence, as the verdict shows they did. A member of a political party requested the defendant to suspend a political banner, which he furnished, across one of the principal streets in the borough of Dubois, between the Commercial Hotel and the Deposit National Bank. He asked the defendant to put it up, take it down after the election and attend to it for him, saying that he did not want to have anything to do with it. The defendant put up the banner, at first suspending it by a

\*214

\*rope, but the rope breaking, substituted for it a wire cable of the defendant's, and, the plaintiff says, did so without further orders. This cable was fastened on the hotel side by taking two turns round a chimney and clamping the end. The chimney stood thirty-one inches from the edge of the cornice over the street, was twenty-one inches square at the base, and had a tin flashing from the roof inserted between the courses of brick two or three courses above the roof. According to the plaintiff's evidence the cable was attached above the flashing. The lower corners of the banner were attached to the buildings on their respective sides. Five days after the banner was suspended the man who employed the defendant caused it to string electric lights along the wire, not otherwise interfering with the work. The same day in the afternoon, the weather being stormy, the banner dragged the chimney over and a brick struck Pancoast on the head, making a comminuted fracture of the skull. The defendant put up the banner a third time after this fall, again, the plaintiff says, without further direction, and when the election was over took it down.

[2] If these were the facts, and, except with regard to the extent of the defendant's control, they could not be disputed, manifestly the verdict was warranted. It did not leave the defendant free from any duty to



Pancoast and the other travelers in the street that they had no contract with it. An act of this kind that reasonable care would have shown to endanger life, might have made the actor guilty of manslaughter, if not, in an extreme case, of murder. *Rig-maldon's Case*, Lewin, 180. See *Nash v. United States*, 229 U. S. 373, 377, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Commonwealth v. Pierce*, 138 Mass. 165, 178, 52 Am. Rep. 264. The same considerations apply to civil liability for personal injuries from similar causes that would have been avoided by reasonable care. See *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324. A man

<sup>\*215</sup>  
is not free to introduce a danger \*into public places even if he be under no contract with the persons subjected to the risk.

[3] It hardly is denied that there was evidence of negligence, but it was held by the Circuit Court of Appeals that the defendant's relation to the work ceased when the banner was hung, that it had no further control over it and was not liable for what happened thereafter. Of course it is true that when the presence or absence of danger depends upon the subsequent conduct of the person to whom control is surrendered, the previous possessor may be exonerated when the control is changed. *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; *Murphey v. Caralli*, 3 Hurlst. & Colt. 462; *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968; *Glynn v. Central R. R. Co.*, 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 15 N. E. 84, 4 Am. St. Rep. 279. But how far this principle will be carried may be uncertain. *Union Stock Yards Co. v. Chicago, Burlington & Quincy R. R. Co.*, 196 U. S. 217, 223, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525. And when as here the danger had been called fully into existence by the defendant it could not escape liability for the result of conditions that it alone knew, had created and had arranged to have continue, by stepping out of the control a few days before the event came to pass. *Harris v. James*, 45 L. J., Q. B. 545; *Todd v. Flight*, 9 C. B. N. S. 377; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Jackman v. Arlington Mills*, 137 Mass. 277, 283; *Dalay v. Savage*, 145 Mass. 38, 41, 12 N. E. 841, 1 Am. St. Rep. 429; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49, 15 N. E. 84, 4 Am. St. Rep. 279.

[4, 5] But it could not be said as matter of law that the defendant had stepped out of control. The facts in their legal aspect probably were somewhat hazy. Presumably the tenant of the hotel simply permitted what was done and had no other relation to it than such as might be imposed upon him

by the law. Evidently the defendant handled the banner when it wanted to, and no

one else <sup>\*216</sup> touched it. The defendant's employer if he told the truth not only did not intermeddle but might be found to have expressly required the defendant to take the responsibility. All the probabilities are that such control as there was remained with the defendant. The defendant got more than it was entitled to when the jury were instructed that even if the fall was due to negligence in putting up the banner, the defendant would not be liable unless by arrangement it had assumed a continuing duty to maintain the banner in a safe condition. The testimony on the two sides was contrasted and it was left to the jury to say which they would believe.

[6] As we have implied, we regard it as too plain for discussion that the plaintiff's evidence if believed warranted a finding that the defendant undertook the care of the banner while it was up. An effort is made to establish an error in allowing an amendment to the declaration after the statute of limitations had run. The declaration originally alleged negligence in the use of the chimney and that the fall was due to the use of the chimney as alleged. The amendment alleged also that defendant maintained the banner. If any objection is open it is enough to say that the original declaration was sufficient and that the amendment plainly left the cause of action unchanged.

Judgment reversed.

Judgment of the District Court affirmed.

(253 U. S. 345)

PORTO RICO RY., LIGHT & POWER CO.  
v. MOR.

(Argued April, 23, 1920. Decided June 1, 1920.)

No. 728.

1. COURTS ~~CO~~ 438—ALIEN DOMICILED IN PORTO RICO NOT ENTITLED TO SUE IN UNITED STATES DISTRICT COURT.

Under Act March 2, 1917, § 41 (Comp. St. 1918, § 3803qq), giving the United States District Court for Porto Rico jurisdiction of all controversies where all of the parties on either side are citizens or subjects of a foreign state or citizens of a state, territory, or district of the United States "not domiciled in Porto Rico," the quoted clause applies to aliens as well as American citizens, and a Spanish subject domiciled in Porto Rico cannot sue a Porto Rico corporation in such court; especially as an opposite construction would be inconsistent with the spirit of article 11 of the treaty of 1898 with Spain, guaranteeing to Spaniards residing in Porto Rico the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

2. STATUTES  $\Rightarrow$  196—CLAUSE FOLLOWING SEVERAL WORDS APPLIED TO ALL.

When several words in a statute are followed by a clause which is as much applicable to the first and other words as to the last, the natural construction of the language demands that it be read as applicable to all.

3. COURTS  $\Rightarrow$  438—LANGUAGE IN ACT RELATIVE TO JURISDICTION OF DISTRICT COURT IN PORTO RICO CONSTRUED TO EFFECTUATE GENERAL PURPOSE.

Any doubt as to whether the clause "not domiciled in Porto Rico," in Act March 2, 1917, § 41 (Comp. St. 1918, § 3803qq), relative to the jurisdiction of the United States District Court, applies to aliens, should be so resolved as to effectuate the general purpose of Congress to curtail the jurisdiction of such court.

On a Certificate from the United States Circuit Court of Appeals for the First Circuit.

Action by Adalberto Diaz Mor against the Porto Rico Railway, Light & Power Company. Judgment for plaintiff, and defendant took the case by writ of error to the Circuit Court of Appeals for the First Circuit, which certified the question of the District Court's jurisdiction to the Supreme Court. Certified question answered in the negative.

Mr. Carroll G. Walter, of New York City, for Porto Rico Ry., Light & Power Co.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Mor, a subject of the King of Spain, domiciled in Porto Rico, brought in the United

\*346

States District Court for \*Porto Rico this action at law for an amount exceeding \$3,000, exclusive of interest and costs, against the Porto Rico Railway, Light & Power Company, a Porto Rico corporation having its principal place of business there. Objection to the jurisdiction of the trial court was overruled and the plaintiff recovered judgment. The case came before the Circuit Court of Appeals for the First Circuit on writ of error and that court has presented to us by certificate the question whether the District Court had jurisdiction. The answer depends upon the construction to be given to the following provision contained in section 41 of the so-called Jones Act of March 2, 1917, c. 145, 39 Stat. 951, 965 (Comp. St. 1918, § 3803qq), which provides a civil government for Porto Rico:

"Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of \$3,000. \* \* \*

[1] It is clear under this act that if Mor, instead of being a Spanish subject, had been a citizen of one of the United States, the court would not have had jurisdiction, since he was domiciled in Porto Rico. The precise question, therefore, is whether the restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens.

The judicial system of Porto Rico prior to annexation to the United States comprised a Supreme Court and district trial courts of general jurisdiction and municipal courts. The proceedings in all of these courts were conducted in the Spanish language and according to the forms of the civil law. By section 33 of the Foraker Act, April 12, 1900, c. 191, 31 Stat. 77, 84 (Comp. St. § 3784),

\*347

which established what was intended \*as a temporary civil government for the island, these insular courts were continued, with the proviso that the judges of the Supreme Court should be appointed by the President, and the judges of the inferior courts by the Governor. By section 40 of the Jones Act (Comp. St. § 3803q) the jurisdiction of these courts and the forms of procedure in them were further continued.

The "District Court of the United States for Porto Rico" provided for by section 41 of the Jones Act was, in effect, a continuation of the District Court of the United States provided for by section 34 of the Foraker Act, as amended by the Act of March 2, 1901, c. 812, sec. 3, 31 Stat. 953 (Comp. St. § 3786).<sup>1</sup> Both acts conferred upon the court jurisdiction of all cases cognizable in Circuit or District Courts of the United States; the court is by both directed to proceed in the same manner as those courts; and in both there is an express provision that the pleadings and all proceedings shall be conducted in the English language. But the Jones Act greatly abridged the jurisdiction. The jurisdictional amount, which by the amendatory act of March 2, 1901, had been lowered to \$1,000, was raised to \$3,000. And, whereas by the amendment of 1901 the court had been given jurisdiction in case either party was a citizen of the United States, even if he was domiciled in Porto Rico, the Jones Act limited the jurisdiction dependent on American citizenship to the cases where the Americans were not domiciled in Porto Rico. Whether it likewise

<sup>1</sup> Act of March 2, 1901, c. 812, § 3: "That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs the sum or value of one thousand dollars."



limited jurisdiction dependent on alienage is the question submitted to us.

\*348

[2, 3] \*No reason appears why the clause "not domiciled in Porto Rico" should not be read as applying to the entire phrase "citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States." When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. *United States v. Standard Brewery*, 251 U. S. 210, 218, 40 Sup. Ct. 139, 64 L. Ed. —; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 18-19, 25 Sup. Ct. 158, 49 L. Ed. 363, and cases cited. Furthermore, special reasons exist for so construing the clause in question. The act manifests a general purpose to greatly curtail the jurisdiction of the District Court. If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress. *American Security & Trust Co. v. District of Columbia*, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856; *Inter-Island Steam Navigation Co. v. Ward*, 242 U. S. 1, 37 Sup. Ct. 1, 61 L. Ed. 113. But it seems to us clear that it applies alike to aliens and to American citizens.

Suit may be brought in the District Court if either party has the jurisdictional qualifications; that is, the act confers upon such party not merely the right to sue but the liability to be sued. In the population of Porto Rico there are many aliens and these are largely Spaniards.<sup>2</sup> If the limitation "not

\*349

domiciled in Porto Rico" were \*inapplicable to aliens the result would work peculiar hardship and assuredly unintended discrimination against these Spaniards. A Spanish subject domiciled in Porto Rico might be sued by an American domiciled in Porto Rico or a Porto Rican in the District Court, where the proceedings are conducted in the English language and according to the forms of Anglo-American law; whereas an American domiciled in Porto Rico could be sued only in the insular courts where the proceedings are conducted in the Spanish language and according to the procedure and processes of

<sup>2</sup> "It is somewhat surprising to find that 886,442 of the actual population are classed as Spaniards, and only 4,324 as foreigners." Report on the Island of Porto Rico by Henry C. Carroll, Special Commissioner, October 6, 1899, p. 11.

"Spanish-born were 7,690, or 55 per cent. of the total foreign born. The United States contributed 1,069." Commercial Porto Rico, Department of Commerce and Labor, April, 1907, p. 11.

"Of the total number of males 21 and over in 1910, 238,635 were of Porto Rican citizenship, 4,112 were of Spanish citizenship, 1,836 were citizens of the United States, and 2,385 were citizens of other foreign countries." Statistics for Porto Rico, 13th Census, p. 24.

the civil law. This might not only prove very inconvenient to Spanish residents, but would be inconsistent with the spirit of article 11 of the treaty of 1898 between Spain and the United States (30 Stat. 1754, 1760), under which Spaniards residing in Porto Rico were guaranteed "the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong."

Congress could not have intended to give the District Court jurisdiction of any controversy to which a domiciled alien is a party while denying under similar circumstances jurisdiction where a domiciled American is a party.

The question submitted is answered  
No.

(253 U. S. 330)

UNITED STATES v. NORTH AMERICAN  
TRANSPORTATION & TRADING CO.

NORTH AMERICAN TRANSPORTATION &  
TRADING CO. v. UNITED STATES.

(Argued April 30, 1920. Decided June 1, 1920.)

Nos. 319 and 320.

1. UNITED STATES ⇐69—PROMISE TO PAY FOR  
PROPERTY TAKEN BY AUTHORIZED OFFICERS IS  
IMPLIED.

When the government, without condemnation proceedings, appropriates private property for a public use under legislative authority, it impliedly promises to pay therefor; but such promise is not implied unless the officer who physically took possession of the property was duly authorized so to do, either directed by Congress or by the official upon whom Congress conferred the power.

2. UNITED STATES ⇐60—ONLY SECRETARY OF  
WAR IS AUTHORIZED TO TAKE LAND FOR MIL-  
ITARY RESERVATION.

The power to take lands for barracks and troop quarters under Appropriation Act March 3, 1899, May 26, 1900, was conferred on the Secretary of War, in view of Act Aug. 1, 1888, § 1 (Comp. St. § 6909), and Act Aug. 18, 1890, § 1 (Comp. St. § 6911), so that the right to recover for private property taken for such purposes accrued, not when physical possession of the property was taken by an army officer not authorized by the Secretary of War, but only when the Secretary of War first approved the action.

3. UNITED STATES ⇐69—SAVING OF PRIVATE  
RIGHTS IN ORDER TAKING MILITARY LAND  
GIVES RIGHT TO COMPENSATION.

A statement in the President's order that land taken for military purposes was reserved, subject to any legal rights existing to any of the land, refers only to the right to compensation of owners of private property within the reservation, which had already been taken by the army officers.

4. UNITED STATES  69—POSSESSION BY SECRETARY OF WAR UNDER AUTHORITY OF CONGRESS GIVES RIGHT OF ACTION.

Even if private property was excepted from an order reserving land for military purposes, continued possession thereof by the Secretary of War, who had ample authority from Congress, and the erection of buildings thereon by him, gives the owners a right of action against the government.

5. UNITED STATES  110—INTEREST NOT RECOVERABLE ON CLAIM FOR COMPENSATION FOR LAND TAKEN BY UNITED STATES.

The right of an owner of land taken by an authorized officer for public use to recover compensation from the government is not based on the Fifth Amendment to the Constitution, but upon an implied promise to pay for the land, which can be enforced by the Court of Claims, so that interest on the value between the time of taking and the time of payment cannot be recovered, under Judicial Code, § 177 (Comp. St. § 1168), denying allowance of interest on any claim by the Court of Claims unless upon a contract expressly stipulating for interest.

6. UNITED STATES  110—INTEREST ON COMPENSATION FOR USE OF LAND BEFORE PAYMENT NOT RECOVERABLE.

Even though in condemnation proceedings by the United States the owner of property could recover interest on the value from the date of the taking to the time of payment, not as interest, but as compensation for the use of the property, no such recovery can be allowed in a suit in the Court of Claims on the government's implied promise to pay for land taken by it.

7. APPEAL AND ERROR  172(3)—RIGHT TO RECOVER USE VALUE OF PROPERTY TAKEN BY GOVERNMENT MUST BE RAISED BELOW.

Even if an owner of land which was taken by the government for public use could recover the value of the use between the date of the taking and the time of payment of the value of the land, it cannot complain on appeal of the denial of use value, where the petition merely alleged the value, but there was no other reference thereto in the record.

Appeals from the Court of Claims.

Suit by the North American Transportation & Trading Company against the United States. Judgment for the claimant for a part only of the amount claimed was rendered by the Court of Claims (53 Ct. Cl. 424), and both parties appeal. Affirmed.

\*331

\*Messrs. Burt E. Barlow and A. R. Serven, both of Washington, D. C., for North American Transportation & Trading Co.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought by the North American Transportation & Trading Company in the Court of Claims on December 7, 1906.

\*332

The petitioner seeks to recover the \*value of a placer mining claim situated on the public land near Nome, Alaska, which is alleged to have been taken by the government on December 8, 1900, and also compensation for use and occupation thereof after that date. Ownership of the property by the company and the physical taking and continued possession of it by the government were not controverted. The lower court found, also, that about July 1, 1900, Gen. Randall, United States Army, commanding the Department of Alaska took possession, as a site for an army post, of a large tract of public land which included the mining claim. The company yielded possession of the part occupied by it being unable to withstand his authority, but at the same time it demanded compensation, which Gen. Randall promised would be paid. Use of the site for an army post was thereafter recommended by him to the Secretary of War. Pursuant to this recommendation, the President issued on December 8, 1908, an order by which the tract was reserved from sale and set aside for military purposes; and on December 20, 1908, the Secretary of War announced it as a public reservation, for the present under the control of the War Department. The tract has been used as an army post continuously since possession was first taken by Gen. Randall. The buildings erected thereon are situated on that portion of the land which had been the company's placer claim; so that at no time since Gen. Randall took possession of the land has the company been able to operate its claim or do any further mining work thereon.

The government contended that, if on the facts there was a legal taking or other act entitling petitioner to recover compensation, the cause of action had accrued more than six years prior to the commencement of this suit, and that therefore under section 156 of the Judicial Code (Comp. St. § 1147) the petition should be dismissed. The Court of Claims found that the company's property

\*333

was taken within the \*six years—that is, on December 8, 1900—and that its then reasonable value was \$23,800. It entered judgment for that amount. 53 Ct. Cl. 424. Both parties appealed—the government, on the ground that the right of recovery, if any, was barred; the company, on the ground that no compensation was allowed for the use and occupation between the date of the taking and the date of entry of judgment.

[1] First. When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor. *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *United States v. Lynah*, 188 U. S. 445,



462, 465, 23 Sup. Ct. 349, 47 L. Ed. 539; *United States v. Kelly*, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; *United States v. Cress*, 243 U. S. 316, 329, 37 Sup. Ct. 380, 61 L. Ed. 746. But, although Congress may have conferred upon the Executive Department power to take land for a given purpose, the government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See *Ball Engineering Co. v. J. G. White & Co.*, 250 U. S. 46, 54-57, 39 Sup. Ct. 393, 63 L. Ed. 835. In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

[2] The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and of May 26, 1900, c. 586, § 1, 31 Stat. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in *Hooe v. United States*, 218 U. S. 322, 31 Sup. Ct. 85, 54 L. Ed. 1055, does not exist here. But the power granted by those acts was conferred upon the Secretary of War. Act Aug. 1, 1888, c. 728, § 1, 25 Stat. 357 (Comp. St. § 6909); Act Aug. 18, 1890, c. 797, § 1, 26 Stat. 316 (Comp. St. § 6911). It was for him to

\*334

determine whether the army post should be established and what land should be taken therefor. Compare *Nahant v. United States*, 130 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723; *Id.*, 153 Fed. 520, 82 C. C. A. 470; (*C. C.*) *United States v. Certain Lands in Narragansett, R. I.*, 145 Fed. 654. Power to take possession of the company's mining claim was not vested by law in Gen. Randall; and the Secretary of War had not, so far as appears, either authorized it or approved it before December 8, 1900. It was only after the President reserved from sale and set aside for military purposes the large tract of land in which the company's mining claim was included that the Secretary of War took action which may be deemed an approval or ratification of what Gen. Randall had done. What he had done before that date having been without authority, and hence tortious, created no liability on the part of the government. *Higo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994. Since the cause of action arose after December 7, 1900, this suit was not barred by section 156 of the Judicial Code.

[3, 4] The suggestion is made that, as the President's order reserved the land "subject to any legal rights which may exist to any land within its limits," the Secretary's action thereafter was not a taking of the mining claim. But this clause and the reference to

it in the announcement made by the Secretary must, in view of the circumstances, have meant merely that the right to compensation of the company and of any others was preserved. Furthermore, the suggestion, if sound, would not aid the government; it would result, at most, in slightly postponing the date of the legal taking. For the continued holding possession of the land after the announcement of the Secretary of War and the erection of buildings thereon by his authority was such an appropriation as would, in any event, give the right of action against the government.

[5] Second. The company contends that it should receive, in addition to the value of the property at the time of the taking, compensa-

\*335

tion for the occupation and use \*thereof from that date to the date of the judgment—a period of nearly 20 years, during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment.<sup>1</sup> In a number of cases in the lower federal courts, also, the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the state in which the land was situated, and under the law of the state interest was recoverable. *United States v. Engeman* (D. C.) 46 Fed. 898; *Town of Hingham v. United States*, 161 Fed. 295, 300, 88 C. C. A. 341, 15 Ann. Cas. 105; *United States v. Sargent*, 162 Fed. 81, 89 C. C. A. 81; *United States v. First National Bank* (D. C.) 250 Fed. 299, Ann. Cas. 1918E, 36; *United States v. Rogers*, 257 Fed. 397, 168 C. C. A. 437; *United States v. Highsmith*, 257 Fed. 401, 168 C. C. A. 441. These conformity provisions, which relate only to the laws of states, can have no application to lands in Alaska; nor can they affect proceedings brought in the Court of Claims.

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment (*Schlinger v. United States*, 155 U. S. 163, 168, 15 Sup. Ct. 85, 39 L. Ed. 108; *Basso v. United States*, 239 U. S. 602, 36 Sup. Ct. 226, 60 L. Ed. 462), but upon the existence of an implied contract entered into by the United States (*Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010; *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519; *Tempel v. United States*, 248 U. S. 121, 129, 39 Sup. Ct. 56, 63 L. Ed. 162; *United States v. Great Falls Mfg. Co.*, *supra*; *United States*

<sup>1</sup> See cases collected in 15 Cyc. pp. 930, 931, and in 10 R. C. L. p. 163.

(40 Sup.Ct.)

v. Lynah, supra); and the contract which is implied is to pay the value of property as of the date of the taking <sup>\*336</sup> (Bauman v. Ross, <sup>\*167</sup> U. S. 548, 587, 17 Sup. Ct. 966, 42 L. Ed. 270; United States v. Honolulu Plantation Co., 122 Fed. 581, 585, 58 C. C. A. 279; Burt v. Merchants' Insurance Co., 115 Mass. 1, 14). Interest may not be added, because section 177 of the Judicial Code, re-enacting section 1091 of the Revised Statutes (Comp. St. § 1168), declares that:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

See Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543.

Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), cannot be attributed to the sovereign. United States v. North Carolina, 130 U. S. 211, 216, 10 Sup. Ct. 920, 34 L. Ed. 336. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. United States v. Sherman, 98 U. S. 565, 567-568, 25 L. Ed. 235. So rigorously is the rule applied that, in the adjustment of mutual claims between an individual and the government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it. United States v. Verdier, 164 U. S. 213, 218, 219, 17 Sup. Ct. 42, 41 L. Ed. 407. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party (Stanley v. Schwalby, 162 U. S. 255, 272, 16 Sup. Ct. 754, 40 L. Ed. 960; Pine River Logging Co. v. United States, 186 U. S. 279, 296, 22 Sup. Ct. 920, 46 L. Ed. 1164), and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business (Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771), are hardships from which, with rare exceptions (William Cramp & Sons, etc., v. Curtis Turbine Co., 246 U. S. 28, 40-41, 38 Sup. Ct. 271, 62 L. Ed. 560), Congress has been unwilling to relieve those who either voluntarily deal with the government or are otherwise affected by its acts.

[6] The company argues that interest is allowed in condemnation proceedings, not

\*337

qua interest for default or <sup>\*337</sup> delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see Klages v. Terminal Co., 160 Pa. 386, 28 Atl. 862), and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common-law rule which

exempts the sovereign from liability to pay interest (United States v. New York, 160 U. S. 598, 622, 16 Sup. Ct. 402, 40 L. Ed. 551). This may be the theory on which interest should be allowed in compensation proceedings;<sup>2</sup> and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the government. For, as suggested in United States v. Sargent, supra, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the government institutes in order to secure title to land. Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629. On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim; the other for use and occupation after December 8, 1900, at the rate of \$7,500 per year. If the company had brought the suit immediately after the taking, it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in

\*338

contract <sup>\*338</sup> can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of \$23,800, which is found to be the value of the mining claim when it was taken nearly 20 years ago, must be deemed to be due in part to its delay in instituting the suit, and in part to the delays of litigation, for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

[7] Furthermore, if it is not interest which the company seeks, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the \$100,000, alleged to be the value of the property, the further sum of \$7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation, the company did not, so far as appears, make any request of any kind in the

<sup>2</sup> Compare Moll v. Sanitary District, 228 Ill. 633, 636, 81 N. E. 1147; Irrigation Co. v. McLain Co., 69 Kan. 334, 341-342, 76 Pac. 853; Kidder v. Oxford, 116 Mass. 165; Hamersley v. New York, 56 N. Y. 533, 537; Sioux City R. R. Co. v. Brown, 13 Neb. 317, 319, 14 N. W. 407; Atlantic & Great Western Ry. Co. v. Koblenz, 21 Ohio St. 334, 338.



court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion and it is not referred to in the application for an appeal.

In *Shoemaker v. United States*, 147 U. S. 282, 321, 13 Sup. Ct. 361, 37 L. Ed. 170, and *Bauman v. Ross*, 167 U. S. 548, 598, 17 Sup. Ct. 960, 42 L. Ed. 270, to which both counsel refer, the point here decided was not involved, since the court held that under the express terms of the acts there in question the United States were not entitled to possession of the land until the damages had been assessed and actually paid.

The judgment below is affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

(253 U. S. 275)

# UNITED STATES v. OMAHA TRIBE OF INDIANS.

## OMAHA TRIBE OF INDIANS v. UNITED STATES.

(Argued March 18, 1920. Decided June 1, 1920.)

Nos. 243, 244.

1. INDIANS ⇐6—TREATY OBLIGATION TO PROTECT FROM HOSTILE TRIBES HELD TO IMPOSE NO LIABILITY, WHERE PROTECTION NOT DEEMED NECESSARY BY PRESIDENT.

Under article 7 of the treaty of March 16, 1854, with the Omaha Indians, providing that the United States would protect such Indians from hostile tribes as long as the President might deem such protection necessary, no liability rests on the government because of the killing of members of the tribe and the stealing of their horses by hostile tribes, where there is no finding of a failure to provide protection deemed necessary by the President.

2. COURTS ⇐468—FINDING OF COURT OF CLAIMS AS TO DEATH OF CATTLE PURCHASED FOR INDIANS CONSTRUED.

A finding of the Court of Claims that cattle purchased by the government for Indians of the Omaha Tribe under a provision of the treaty of March 6, 1865, were in bad condition when they reached the reservation, and that 50 of them died, necessarily imports that they either were in bad condition when purchased, or were badly cared for on the way to the reservation.

3. INDIANS ⇐7—DEATH OF CATTLE PURCHASED FOR INDIANS IN BAD CONDITION OR BADLY CARED FOR HELD TO CONSTITUTE CLAIM AGAINST GOVERNMENT.

Under the treaty of March 6, 1865, with the Omaha Indians, providing that the consideration for lands thereby ceded might be expended by the government for goods, provisions, cattle, etc., for the benefit of the In-

dians, the tribe are entitled to payment for the value of cattle purchased in such bad condition, or so badly cared for on the way to the reservation, that they died.

4. COURTS ⇐468—FINDING OF COURT OF CLAIMS AS TO CONSTRUCTION OF BUILDING FROM INDIANS' MONEYS CONSTRUED.

A finding of the Court of Claims that a building constructed by the government for an infirmary for certain tribes of Indians, and paid for in part out of money belonging to one of such tribes, was not used and was not such a building as was contemplated by treaties with such tribe, did not mean that a building of that general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians.

5. COURTS ⇐389—FINDING OF COURT OF CLAIMS HELD ONE OF FACT, OR MIXED FACT AND LAW, AND NOT REVIEWABLE.

A finding of the Court of Claims that a building constructed by the government as an infirmary for certain tribes of Indians was not used, and was not such a building as was contemplated by treaties with one of such tribes, was either a finding of fact, or a finding of mixed facts and law, with the question of law inseparable, and in either case was not reviewable.

6. COURTS ⇐449(4)—CONSTRUCTION OF UNFIT BUILDING HELD "MISAPPROPRIATION OF FUNDS," WITHIN ACT GIVING COURT OF CLAIMS JURISDICTION.

The construction by the government of a building as an infirmary for certain tribes of Indians, which was not used and was not suitable for the use of the Indians, was a "misappropriation" of the funds of the tribe for purposes not for its material benefit, within Act June 22, 1910, giving the Court of Claims jurisdiction of claims for such misappropriations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misappropriation.]

7. UNITED STATES ⇐110—INTEREST HELD NOT RECOVERABLE ON CLAIM FOR CONSIDERATION FOR CEDED LANDS.

The treaty of March 16, 1854, with the Omaha Indians, containing a cession of lands south of a prescribed line, and providing for a similar cession of lands north of such line at the same price per acre, if they proved unsuitable as a location for such Indians, held not to have deferred the passing of title to the land north of such line until payment of the consideration, and hence under Judicial Code, § 177 (Comp. St. § 1168), interest was not recoverable on a claim for the purchase price until the rendition of judgment by the Court of Claims.

8. UNITED STATES ⇐110—ACT RELATIVE TO CLAIMS OF INDIANS HELD NOT TO CHANGE USUAL RULE AS TO INTEREST.

Act June 22, 1910, conferring on the Court of Claims jurisdiction of claims of the Omaha Tribe of Indians against the United States, does not, by giving it authority to hear and

determine both legal and equitable claims, take the claim out of the application of Judicial Code, § 177 (Comp. St. § 1168), providing that interest shall not be allowed on claims until the rendition of judgment, unless upon a contract expressly stipulating for interest.

#### Appeals from the Court of Claims.

Suit by the Omaha Tribe of Indians against the United States. From a judgment of the Court of Claims in favor of the claimant, for less than the amount claimed (53 Ct. Cl. 549), the United States appeals, and the claimant brings a cross-appeal. Reversed in part, and affirmed in part.

\*276

\*Mr. Charles H. Marillat, of Washington, D. C., for Omaha Tribe of Indians.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

We have here an appeal and a cross-appeal from a judgment of the Court of Claims in a suit brought under the Act of June 22, 1910 (36 Stat. 580, c. 313), which conferred upon that court jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha tribe of Indians may have or claim to have against the United States \* \* \* under the treaty between the United States and the said tribe of Indians, ratified and affirmed March sixteenth, eighteen

\*277

hundred and fifty-four, or under \*any other treaties or laws, or for the misappropriation of any funds of said tribe for purposes not for its material benefit, or for failure of the United States to pay said tribe any money due," with authority to hear and determine all legal and equitable claims of the tribe, and also any legal or equitable defense, set-off, or counterclaim, and to settle the rights both legal and equitable of the parties, notwithstanding lapse of time or statutes of limitation.

The Court of Claims, after hearing the case, made findings upon which it awarded judgment in favor of the Indians for various sums aggregating \$122,295.31. 53 Ct. Cl. 549.

By article 1 of the treaty of March 16, 1854 (10 Stat. 1043), the Omaha Indians ceded to the United States all their lands west of the Missouri river and south of a line drawn due west from a point stated, reserving the country north of that line for their future home, with a proviso that, if this country should not, on exploration, prove to be a satisfactory and suitable location for the Indians, the President might with their consent set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them, not greater in extent than 300,000 acres, in which case all of the country belonging to said In-

dians north of the line specified should be ceded to the United States, and the Indians should receive the same rate per acre for it, less the number of acres assigned in lieu of it, as was agreed to be paid for the lands south of the line. By article 4, in consideration of and payment for the country thus ceded, and certain relinquishments made by the Indians, the United States agreed to pay to them certain sums of money, aggregating \$840,000, in specified annual installments commencing on January 1, 1855; these sums to be paid to the Omahas or expended for their use and benefit under the direction of the President of the United States, who was from time to time to determine at his discretion what proportion of the annual payments should be paid in money and what

\*278

proportion \*applied to and expended for the moral improvement and education of the Indians, for such beneficial objects as in his judgment would be calculated to advance them in civilization, for buildings, opening farms, fencing, breaking land, providing stock, etc., and for medical purposes. By article 5, in order to enable the Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and for certain other expenses, they were to receive from the United States the further sum of \$41,000, to be paid out and expended under the direction of the President and in such manner as he should approve.

The Court of Claims found that the Omahas were not satisfied with the country to the north of the east and west line mentioned, and duly elected to take for their future home a tract of 300,000 acres south of the line; and, this fact being reported to the President, by his direction a tract of 300,000 acres south of the line was set apart for them. The court found that the area of the land north of the line belonging to the Indians was 783,365 acres, and that after deducting from this the 300,000 acres set apart for them in accordance with the provisions of the treaty, there was an excess of 483,365 acres, for which they had not been paid. The price for this was fixed by taking the aggregate of the treaty payments (\$881,000) and dividing it by 4,500,000 acres, the area of the lands south of the line ceded by the Omahas to the United States, making the treaty price 19.6 cents per acre, at which rate the 483,365 acres for which the Indians were still to be paid amounted to \$94,739.54. This was awarded to them.

The court found that, of the \$41,000 specified in article 5, the government expended \$23,453.21 in carrying out the provisions of that article, and the balance, \$17,546.79, remained in the hands of the Indian agents of the United States charged with the disburse-



ment of the treaty funds, who were guilty of defalcations of this and other moneys to the aggregate amount of \$18,202.19. This was allowed.

\*279

\*By the seventh article of the treaty the United States agreed to protect the Omahas from the Sioux and all other hostile tribes as long as the President might deem such protection necessary. The court found that after the treaty the Sioux made repeated attacks upon the Omahas in the year of removal and subsequent years; that the United States was called upon by the Omahas to protect them, and such protection was necessary as soon as they removed to their new home and for several years thereafter, but no protection was afforded them by the United States. The Sioux killed 22 Omahas and stole 152 horses; the latter worth \$30 per head. The court allowed \$4,560 for the horses, but made no allowance for the Indians killed.

By a treaty concluded March 6, 1865 (14 Stat. 667), the United States agreed to pay the Omahas for the cession of a part of their reservation the sum of \$50,000, to be expended "for goods, provisions, cattle, horses," etc., for their benefit. Pursuant to this, as the Court of Claims found, 103 head of stock cattle were delivered in the year 1867, for which \$3,432.99 was paid out of money belonging to the Omahas. "These cattle, when they reached the reservation, were in bad condition, and 50 of them died," of an average value of \$33.33 per head; the 50 being worth \$1,666.50. This sum was allowed.

Under article 4 of the treaty of 1854 and article 2 of the treaty of 1865 certain moneys were to be or might be expended for the benefit of the Indians in the way of improvements upon their reservation, and in other ways. Under these provisions, in the year 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. The Court of Claims found that this building was not used, and was not such a building as was contemplated by the treaties with the Omahas, and that, of its cost, \$3,127.08 was paid out of money belonging to them. This sum was allowed.

The principal reason for the government's

\*280

appeal lay in \*the award to the tribe of \$94,739.54 for the excess land north of the dividing line mentioned in the treaty; it having been contended in the court below that the tribe owned none of that land. The Court of Claims having found to the contrary, the government moved this court, after taking appeal, for an order remanding the case, with directions for further findings on the question. This motion having been overruled, as well as a counter motion submitted by the claimant for a certification of the entire record to this court, the government concedes that it cannot contest the correctness of the judgment upon this item.

[1] As to the item of \$4,560 allowed as the value of horses killed by the Sioux Indians, we conclude that the objection of the government is well founded. The obligation of the treaty was to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." The obligation depended upon an exercise of discretion by the President. There is no finding of a failure to provide any protection deemed by the President to be necessary; hence nothing to create a liability, legal or equitable, under the treaty clause.

The item of \$18,202.19 allowed for defalcations of the Indian agents is not disputed.

[2, 3] The government contests the allowance for the stock cattle upon the ground that the fact that they were in bad condition when they reached the reservation is not sufficient to show that they were in such condition when purchased; it being suggested that their defective condition upon reaching the reservation may have been due to the rigors and hardships of the drive from the market to the reservation. We cannot so interpret the finding, deeming its necessary import to be that the cattle either were in bad condition when purchased or were badly cared for on the way to the reservation. In either event the fault lay with the agents of the United States, and the Indians were entitled to credit for the sum allowed on this account.

\*281

[4-6] \*The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of article 4 of the treaty of 1854, authorizing the President to expend a part of the fund "for such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes." We construe the finding, "This building was not used, and it was not such a building as was contemplated by the treaties," as meaning, not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law, where the question of law is inseparable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable. *Ross v. Day*, 232 U. S. 110, 116, 117, 34 Sup. Ct. 233, 58 L. Ed. 528, and cases cited. The fact that the building was not used shows that the tribe did not accept it, and received no benefit from it. And since, because of its unfitness, they were not obliged to accept it, the expenditure of their money in its construction was a misappropriation of funds of the tribe "for purposes not for its material bene-

fit," within the meaning of the jurisdictional act. We affirm the allowance of this item.

[7] Upon the cross-appeal, assignments of error are based upon the disallowance of interest. As to the \$94,739.54 awarded for the land north of the dividing line in excess of 300,000 acres, it is contended that payment of this consideration was a concurrent condition of the passing of title to the United States, and as equity considers that as done which ought to be done the purchase money was, potentially, in the Treasury of the United States as a trust fund, and ought to be treated as if invested for the benefit of the Indians at 5 per cent. interest, under

\*282

Rev. Stat. §§ 2095, 2096, and 3659 (Comp. St. §§ 4073, 4074, 6667), or, in the alternative, that the assumption by the United States of title to the land without compliance with the concurrent condition of payment to the Indians and its sale by the United States to settlers was a breach of trust, requiring the United States to account to the Omahas for the minimum sale price of \$1.25 per acre. But the provisions of articles 1 and 4 of the treaty show that the theory that the passing of title was conditioned upon the payment of the consideration money, or any part of it, is untenable; hence there was no such trust as is asserted, and the price of the land was fixed by the treaty itself. By article 1 there was a cession in present of the land south of the described line, with a proviso that if upon exploration the country north of the line did not prove to be a satisfactory and suitable location for the Indians the President might, with their consent, set apart and assign to them a suitable residence, in which case all of the country belonging to them north of the line "shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line." By article 4 the consideration money for the principal cession was to be paid in the future, and either paid to the Indians direct or expended for their use and benefit from time to time, in the discretion of the President; and, by fair construction, the money that the Indians were to receive under article 1 for the additional cession of the land north of the line, in the event of such cession taking effect, was subject to the same terms as to payment, at least to the extent that it was for the President to determine in his discretion whether it should be paid in cash to the Omahas or expended for their benefit "from time to time." Clearly, an intent to defer passing of title until payment of consideration is negated, and this as truly with

respect to the land north of the line as to that south of it. In both cases there was

\*283

\*simply a present cession, with a covenant for payment of the consideration thereafter, no mention being made of interest. Clearly, the provision of section 177, Judicial Code (Comp. St. § 1168), is applicable:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

[8] It is contended, however, both as to the award for the excess land and as to another claim allowed, that as the jurisdictional act calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest; *Himely v. Rose*, 5 Cranch. 313, 319, 3 L. Ed. 111, being cited. But the jurisdictional act cannot be regarded as taking the case out of the usual rule. *Tillson v. United States*, 100 U. S. 43, 46, 25 L. Ed. 543; *Harvey v. United States*, 113 U. S. 243, 249, 5 Sup. Ct. 495, 28 L. Ed. 987. Nor does *United States v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509, support the claim for interest, for there the particular question was a subject of difference in the negotiation that preceded the treaty; a clause of the treaty itself provided that it should be submitted to the Senate of the United States for decision; the Senate allowed interest; and its determination was accepted by the United States as valid and binding. This court held that the decision of the Senate was controlling, and that therefore interest must be allowed upon that part of the claim to which it applied. See 148 U. S. 433, 449, 451, 452, 478, 13 Sup. Ct. 650, 37 L. Ed. 509.

The contention of claimant that the Court of Claims erred in not making a pecuniary award for the members of the Omaha Tribe killed by the Sioux is covered by what we have said to show that there was error in making an allowance for the horses stolen by the Sioux; the same treaty provision governing both claims.

Other assignments are based upon the failure of the court to find certain facts in accordance with claimant's contention. These require no discussion, since our review is based upon the findings as made.

\*284

\*The judgment will be reversed as to the sum of \$4,560 awarded for horses killed by the Sioux Indians, and in other respects affirmed.

Reversed in part; affirmed in part.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.



(253 U. S. 206)

FORT SMITH &amp; W. R. CO. et al. v. MILLS et al.

(Argued December 13, 1917. Decided June 1, 1920.)

No. 42.

MASTER AND SERVANT  69—INSOLVENT RAILROAD'S WAGE AGREEMENT HELD NOT FORBIDDEN BY FEDERAL ACT.

The Act Sept. 3, 5, 1916 (Comp. St. §§ 8680a-8680d), providing that the compensation of employes of interstate railroads should not be reduced below the then standard and that time in excess of eight hours should be paid for pro rata, did not forbid the doing of work by mutual consent at a less price than the rates laid down, in the case of an insolvent road unable or barely able to pay its way without impairing the mortgage security, where the employes were not merely refraining from demands under the act but, appreciating the situation, desirous of keeping on at the rates fixed by agreement.

Appeal from the District Court of the United States for the Western District of Arkansas.

Suit by the Fort Smith & Western Railroad Company and another against Arthur L. Mills, receiver of the Fort Smith & Western Railway Company, and another. From a decree dismissing the bill, complainants appeal. Reversed.

Messrs. A. C. Dustin and C. M. Horn, both of Cleveland, Ohio, for appellants.

Mr. Assistant Attorney General Frierson, for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the Fort Smith and Western Railroad Company and the trustee of a mortgage given to secure bonds of that road, to enjoin the receiver of the road from conforming to the Act of September 3, 5, 1916, c. 436; 39 Stat. 721 (Comp. St. §§ 8680a-8680d), in respect of hours of service and wages, and to enjoin the District Attorney of the United States from proceed-

\*207

ing to enforce the Act. The bill alleges \*that the physical property is worth over \$7,000,000, but that no dividends ever have been paid upon the stock, that no interest has been paid upon the bonds since October 1, 1907, and that there is a yearly deficit in the earnings of the road. The receiver was appointed in proceedings to foreclose the mortgage. The bill further alleges that the railroad now (1917) is being carried on under an agreement with the men which the men desire to keep, but that the receiver, yielding to the threats of the District Attorney to prosecute him unless he does so, purposes to substitute the much more onerous terms of the Act. It is set up that the Act if con-

strued to apply to this case is void under the Fifth Amendment to the Constitution. The bill was dismissed by the District Court, on motion, for want of equity, and the plaintiffs appealed.

The Act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a general railroad strike. It fixed eight hours as a day's work and provided that for some months, pending an investigation, the compensation of employes of railroads subject to the Act to Regulate Commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since but the rights of the parties require a decision of the case.

In *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1017E, 938, Ann. Cas. 1918A, 1024, it was decided that the Act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was

\*208

\*held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroad to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

But the bill in *Wilson v. New* raised only the general objections to the Act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. —. It was not decided that there might not be circumstances to which the Act could not be applied consistently with the Fifth Amendment, or that the Act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees sub-

ject to this Act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it. We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

But that is the present case. An insolvent road had succeeded in making satisfactory terms with its men, \*enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill and must assume that the men were not merely negatively refraining from demands under the Act but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed import an exception in a case like this.

Decree reversed.

Mr. Justice DAY, Mr. Justice VAN DE VANTER, Mr. Justice PITNEY and Mr. Justice McREYNOLDS agree with this decision limiting the effect of the Adamson Law as stated, but adhere to the views concerning the constitutionality of the Act expressed by them in *Wilson v. New*.

(253 U. S. 287)

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH et al.

(Argued Oct. 15, 1919. Restored to Docket for Reargument Jan. 12, 1920. Reargued March 5 and 8, 1920. Decided June 1, 1920.)

No. 128.

1. WATERS AND WATER COURSES ¶203(6)—ORDER OF COMMISSION PRESCRIBING RATES FOR WATER IS LEGISLATIVE IN CHARACTER.

An order of a state public service commission, prescribing a schedule of maximum future rates chargeable by a water company, is legislative in character.

2. CONSTITUTIONAL LAW ¶298(1)—DUE PROCESS REQUIRES OPPORTUNITY FOR JUDICIAL DETERMINATION OF REASONABLENESS OF RATES PRESCRIBED BY COMMISSION.

Due process of law, under the Fourteenth Amendment, requires that when a state confers

on a public service commission legislative power to prescribe future rates chargeable by a public utility, it must provide a fair opportunity for submitting the utility's claim of confiscation to a judicial tribunal for a determination upon its own independent judgment as to both the law and the facts.

3. CONSTITUTIONAL LAW ¶298(1) — PUBLIC SERVICE COMMISSIONS ¶2—STATUTE DENYING COURTS JURISDICTION TO EXERCISE INDEPENDENT JUDGMENT AS TO REASONABLENESS OF RATES DENIES DUE PROCESS.

The Pennsylvania Public Service Company Law, construed by the state Supreme Court as withholding from the courts power to determine the question of confiscation according to their own independent judgment, on an appeal from the Public Service Commission's order fixing rates, denies due process of law, unless it clearly authorizes some other proceeding in which the order may be challenged as confiscatory.

4. PUBLIC SERVICE COMMISSIONS ¶21—PUBLIC UTILITY HELD NOT TO HAVE LOST RIGHT TO JUDICIAL DETERMINATION BY APPEALING, INSTEAD OF ENJOINING ORDER OF COMMISSION FIXING RATES.

Pennsylvania Public Service Company Law, § 31, relative to injunctions modifying, suspending, or annulling orders of the Public Service Commission, does not provide an opportunity to test the order so clear and definite that a public utility was obliged to proceed thereunder or lose its rights under the federal Constitution to a judicial determination of the reasonableness of the rate prescribed by the commission, by appealing from the order under sections 17 and 22.

5. PUBLIC SERVICE COMMISSIONS ¶27—DUTIES OF COURTS ON APPEAL ARE JUDICIAL IN CHARACTER.

The duties of the courts on appeals from orders of the Public Service Commission under Pa. Public Service Company Law are judicial in character, and not legislative.

Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

In Error to the Supreme Court of the State of Pennsylvania.

Proceeding instituted before the Public Service Commission of Pennsylvania by Ben Avon Borough and others against the Ohio Valley Water Company. A decree of the Superior Court, reversing an order of the Commission, was reversed, and the order reinstated, by the Supreme Court of Pennsylvania (260 Pa. 289, 103 Atl. 744), and the Water Company brings error. Reversed and remanded.

See, also, 251 U. S. 542, 40 S. Ct. 583, 64 L. Ed. —.

Messrs. William Watson Smith, John G. Buchanan, and George B. Gordon, all of Pittsburgh, Pa., for plaintiff in error.



Messrs. Berne H. Evans, of Harrisburg, Pa., and Leonard K. Guiler, David L. Starr, and Albert G. Liddell, all of Pittsburgh, Pa., for defendants in error.

\*288

\*Mr. Justice McREYNOLDS delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be \$924,744 and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at \$1,324,621.80, reversed the order, and remanded the proceeding, with directions to authorize rates sufficient to yield 7 per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order, saying:

"The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes."

It considered those items and held that as there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith.

"A careful examination of the voluminous record in this case has led us to the \*conclusion that in the items wherein the Superior Court differed from the commission upon the question of values there was merely the substitution of its judgment for that of the commission in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

[1, 2] The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; *Lake Erie & Western R. R.*

*Co. v. State Public Utility Commission*, 249 U. S. 422, 424, 39 Sup. Ct. 345, 63 L. Ed. 684. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. *Missouri Pac. R. R. v. Tucker*, 230 U. S. 340, 347, 33 Sup. Ct. 961, 57 L. Ed. 1507; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660, 661, 35 Sup. Ct. 214, 59 L. Ed. 405; *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 538, 36 Sup. Ct. 715, 60 L. Ed. 1148; *Oklahoma Operating Co. v. Love* (March 22, 1920), 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596.

[3] Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

\*290

\*Article 6, Public Service Company Law of Pennsylvania (P. L. 1913, p. 1429):

"Sec. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of section 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled "Practice and Procedure Before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal—*St. Clair Borough v. Tamaqua*

& Pottsville Electric Ry. Co., 259 Pa. 462, 103 Atl. 287; Pittsburgh Railways Co. v. Pittsburgh, 260 Pa. 424, 103 Atl. 959—but they do not definitely decide the point.

[4] Taking into consideration the whole act,  
\*291

statements by \*the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that section 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the federal Constitution. On the contrary, after specifying that within 30 days an appeal may be taken to the Superior Court (section 17), the act provides (section 22):

"At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to section 31.

[5] Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in *Prentis v. Atlantic Coast Line*, supra. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course section 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed, and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

\*292

\*Mr. Justice BRANDEIS, dissenting.

The Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon borough and others, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable, and it prescribed a schedule of lower rates which it estimated would yield 7 per cent. net upon the value of the property used and useful in the service. The company appealed to the Superior Court, contending that the property had been undervalued and

that the rates were, therefore, confiscatory in violation of the Fourteenth Amendment. That court, passing upon the weight of the evidence introduced before the commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the commission to reform its valuation accordingly and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the Superior Court the commission appealed to the Supreme Court of the state, contending that the Superior Court had in passing upon the weight of the evidence exceeded its jurisdiction. The Supreme Court sustained this contention, and, holding, upon a careful review of the evidence and of the opinions below, that the commission had been justified in its findings by "ample testimony" or "competent evidence," and that they were not unreasonable, reversed the decree of the Superior Court and reinstated the order of the commission. *Borough of Ben Avon v. Ohio Valley Water Co.*, 260 Pa. 289, 103 Atl. 744. The case comes here on writ of error under section 237 of the Judicial Code, as amended (Comp. St. § 1214), the company claiming that its rights guaranteed by the Fourteenth Amendment have been violated: (1) because the Public Service Company Law, as construed by the Supreme Court of the State, denies the opportunity of a judicial review of

\*293

the commission's \*order; and (2) that the order, which was reinstated by the Supreme Court, confiscates its property.

First. The commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. Ed. 150. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the Superior Court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determination of the commission or is otherwise not in conformity with law" either to reverse the order or to remand the record to the commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the Superior Court; but it may remand the case to the commission with directions to hear newly discovered evidence and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order



a like appeal lies to that court. Act July 26, 1913, No. 854, §§ 21-25 (P. L. 1913, pp. 1427, 1428); Act June 3, 1915, No. 345 (P. L. 1915, p. 779). The Supreme Court construed this act as denying to the Superior Court the power to pass upon the weight of evidence; and the company contends that for this reason the review had does not satisfy the constitutional requirements of a judicial review.<sup>1</sup>

\*294

\*Whether the appeal to the Superior Court fails, for the reason assigned or for some other reason, to satisfy the constitutional requirements of a judicial review, we need not determine, because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the federal court, to another and unrestricted remedy, the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement. See *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. Ed. 229; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 661, 35 Sup. Ct. 214, 59 L. Ed. 405. For section 31 (P. L. 1913, p. 1429) provides:

"No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

Resort to suit for injunction is made easy in rate controversies like the present by section 41, p. 1432, in which it is provided that the penalties for failure to obey the commission's orders imposed by sections 35, 39, and 59, pp. 1430, 1431, shall not apply to an order declaring a rate unreasonable, if the tariff of

\*295

rates actually charged is filed \*with the commission. The appeal provided for in sections 22-25 was under the original act also to the court of common pleas, but was changed to the Superior Court by the act of July 3, 1915.

No decisions of the Supreme Court of Pennsylvania construing section 31 of this act have been brought to our attention. The com-

pany contends, however, that the construction here suggested has been inferentially made untenable by dicta in *St. Clair Borough v. Tamaqua & Pottsville Elec. Ry. Co.*, 259 Pa. 462, 103 Atl. 287; *Pittsburgh Rys. Co. v. Pittsburgh*, 260 Pa. 424, 103 Atl. 959; *Klein-Logan Co. v. Duquesne Light Co.*, 261 Pa. 526, 104 Atl. 763. But the language relied upon was in each instance used by the court in making the point, not that the sole method of review was by appeal, as distinguished from a bill in equity, but that the function of the courts was to review only after the commission had in the first instance passed upon the case.

Where a state offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was in effect an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. Ed. 337. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See *Iowa Central Railroad Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467. And it is the contention of the plaintiff that because the Supreme Court did not weigh the evidence, but reinstated the order of the commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. The

\*296

defendants, on the other hand, \*insist that the action of the Supreme Court, in reinstating the order, found not merely that there was substantial evidence, but, upon a full review, that there was ample evidence to support the findings, and that the order was reasonable. They contend that the course pursued by the Supreme Court in making such review was that customarily followed in Pennsylvania, both by appellate courts on appeals from chancellors and by trial courts on exceptions to reports of auditors, masters or referees (*Barnes' Estate*, 221 Pa. 399, 70 Atl. 790); and they point out that the same method was pursued on appeal to the Supreme Court prior to the enactment of the Public Service Company Law, at a time when proceedings by consumers to secure reduction of water rates alleged to be unreasonably high were brought in the court of common pleas, subject to appeal to the Supreme Court (*Turtle Creek Borough v. Penna. Water Co.*, 243 Pa. 401, 90 Atl. 194).

The contention of neither party is in my opinion wholly correct. Both overlook the nature of the question of law which was under review by the Supreme Court. It is true that there was no statutory limitation

<sup>1</sup> In *Napa Valley Electric Co. v. Railway Commissioners*, 251 U. S. 366, 40 Sup. Ct. 174, 64 L. Ed. —, this court had before it in section 67 of the Public Utilities Act of California (St. Extra Sess. 1911, p. 55) a procedure substantially similar to that provided by sections 21-25 of the Pennsylvania act set forth above. The court strongly intimated, if it did not decide, that under the provisions of the act the mere denial of a petition to the Supreme Court of the state for a writ of certiorari amounted to an adequate judicial determination of the petitioner's rights.

upon the scope of its review; but it does not follow either that the Supreme Court weighed the evidence and found that the preponderance supported the findings, or that because it failed to weigh the evidence there was either a denial of due process or even a mistake of law. The questions of law before the Supreme Court were, first, whether the Superior Court had jurisdiction to weigh the evidence; second, whether in rendering its decision it weighed the evidence; and, third, whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, would confiscate its property. On each of these questions the Supreme Court found against the contentions of the plaintiff. It held that the Superior Court did not have revisory legislative

\*297

powers, but only the power to \*review questions of law—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found—and in so holding it acted upon the established principle applied in reviewing the findings of administrative boards, that “courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.” *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547, 548, 32 Sup. Ct. 108, 111 (56 L. Ed. 308). It, therefore, reinstated the order of the commission. But it did not do so as an appellate court reviewing on the weight of the evidence findings of fact made by the Superior Court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. *Interstate Commerce Commission v. Union Pacific R. R. Co.*, supra; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 441, 442, 23 Sup. Ct. 571, 47 L. Ed. 892. The presumption created by section 23, P. L. p. 1427, by which an order of the commission is made prima facie evidence of its reasonableness is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body reached after a full hearing. *Darnell v. Edwards*, 244 U. S. 564, 569, 37 Sup. Ct. 701, 61 L. Ed. 1317.

Second. As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the commission were supported by substantial evidence, the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its

property has been undervalued, or unless some error in law is shown.

\*298

\*The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law (*Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305), but also where, as in chancery, the record contains all the evidence and it was open for consideration by and actually passed upon by the highest court of the state (*Egan v. Hart*, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 107, 29 Sup. Ct. 220, 53 L. Ed. 417). And this is true, although the existence of a federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the Fourteenth Amendment. *Minneapolis & St. Louis Railroad Co. v. Minnesota*, 193 U. S. 53, 65, 24 Sup. Ct. 396, 48 L. Ed. 614. This court may, of course, upon writ of error to a state court “examine the entire record, including the evidence, to determine whether what purports to be a finding” upon questions of fact is “so involved with and dependent upon questions of federal law as to be really a decision” of the latter. *Kansas City Southern Co. v. Albers Commission Co.*, 223 U. S. 573, 591–593, 32 Sup. Ct. 316, 320 (56 L. Ed. 556); *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 658, 32 Sup. Ct. 389, 56 L. Ed. 594; *Graham v. Gill*, 223 U. S. 643, 645, 32 Sup. Ct. 396, 56 L. Ed. 586. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence (*Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 528, 32 Sup. Ct. 535, 56 L. Ed. 863) and to substitute the judgment therein of this court for that of the lower court, but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court (*Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 593, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; *Norfolk & Western Railway v. West Virginia*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745).

Here, it is clear, there was substantial evidence to support the findings of the commission; and no adequate reason is shown for

\*299

declining to accept as conclusive the \*facts found by the state tribunals. See *Portland Railway Light & Power Co. v. Oregon Railroad Commission*, 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248; *Miedreich v. Lauenstein*, 232 U. S. 236, 34 Sup. Ct. 309, 58 L. Ed. 584. The rates are predicated on the company's earning 7 per cent. net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that



7 per cent. is a fair return upon the investment, and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company and that the processes by which the commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the Supreme Court of Pennsylvania said:

"The ascertainment of the fair value of the property, for rate-making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts."

The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the commission, affirmed by the highest court of the state, is conclusive upon this court. The case at bar is wholly unlike *Great Northern Railway v. Minnesota*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337, and *Union Pacific Railroad Co. v. Missouri*, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131, where this court reversed the judgments as matter of law upon the facts found by the commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

Mr. Justice HOLMES and Mr. Justice CLARKE concur in this dissent.

(253 U. S. 319)

PENNSYLVANIA R. CO. v. KITTANING IRON & STEEL MFG. CO.

(Argued March 26, 1920. Decided June 1, 1920.)

No. 301.

CARRIERS  $\Leftarrow$  100(1) — DEMURRAGE COLLECTIBLE WHERE SINGLE CARS OF FROZEN ORE COULD HAVE BEEN UNLOADED WITHIN FREE TIME.

Rule 8, § A, subd. 2, of the Uniform Demurrage Code, approved by the Interstate Commerce Commission, providing that no demurrage shall be collected when shipments are frozen while in transit, so as to prevent unloading during the prescribed free time, treats the single car as the unit, and, where any single car of frozen ore might have been unloaded within the free time, demurrage was collectible, though the number of cars received by the consignee at one time could not be so unloaded; the consignee having entered into the average agreement with the railroad prescribed in rule 9.

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Action by the Pennsylvania Railroad Company against the Kittaning Iron & Steel Manufacturing Company. A judgment for defendant was affirmed by the Supreme Court of Pennsylvania (263 Pa. 205, 106 Atl. 207), and plaintiff brings certiorari. Reversed.

See, also, 249 U. S. 595, 39 Sup. Ct. 260, 63 L. Ed. 794.

\*320

\*Messrs. Henry Wolf Bikle, of Philadelphia, Pa., and Frederic D. McKenney and J. S. Flannery, both of Washington, D. C., for petitioner.

Mr. R. L. Ralston, of Kittaning, Pa., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Uniform Demurrage Code discussed in *Swift & Company v. Hocking Valley Railway Company*, 243 U. S. 281, 283, 37 Sup. Ct. 287, 61 L. Ed. 722, was duly published as a part of the freight tariffs of the Pennsylvania Railroad prior to November 1, 1912. From time to time during the months of December, 1912, and February and March, 1913, the Kittaning Iron & Steel Manufacturing Company received from the railroad an aggregate of 227 cars of iron ore, all interstate shipments, and on account of them the railroad

\*321

claimed \$1,209 for demurrage. \*The company refused to pay these, among other, demurrage charges, whereupon this action was brought in a state court of Pennsylvania to recover the amount. The trial court disallowed the claim. The judgment there entered was affirmed by the Supreme Court of the state, and a petition by the railroad for a writ of certiorari was granted, 249 U. S. 595, 39 Sup. Ct. 260, 63 L. Ed. 794.

Before receipt of any of the cars the Kittaning Company had entered into an average agreement with the railroad as provided in rule 9.<sup>1</sup> The aggregate number of days de-

<sup>1</sup> Rule 9. *Average Agreement.*—When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

Section A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5) days' credit be applied in cancellation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

Section B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and \$1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made

tention of these cars after they reached the company's interchange tracks (in excess of the free time under the average agreement),

<sup>\*322</sup> was 1209; and the demurrage <sup>\*</sup>charge fixed by rule 7 was \$1 for each day, or fraction thereof, that a car is detained after the expiration of the free time. The ore in these cars was frozen in transit; and the company insisted that this detention of the cars beyond the "free time" had resulted from this fact and claimed exemption from demurrage charges under rule 8, section A, subdivision 2, which declares that none shall be collected—

"when shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent efforts to unload such shipments."

The Kittanning Company had at its plant a device for thawing cars of frozen ore through "steaming." By this means it was able to unload as much as 5 cars of frozen ore a day. The daily average number of cars of frozen ore received during the three months was far less than 5 cars; but the number received on single days varied greatly. On many days none were received; on some only 1 or 2; and on some, as many as 35. The railroad contended that the standard to be applied for determining, under the rule here in question, whether unloading within the prescribed free time was prevented by the shipments being frozen, was, as in other cases under the Code, the conditions applied to the car treated as a unit. It insisted, therefore, that the determination in any case whether a detention was due to the fact that the contents of a car was frozen could not be affected by the circumstances that a large number of such cars happened to have been "bunched," and that, as each car considered separately could have been unloaded within the free time, the consignee must bear whatever hardship might result from many having arrived on the same day, unless relief were available

<sup>\*323</sup>

ble to him either under the "bunching \*rule" <sup>2</sup>

for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess, nor shall the credits in excess of the debits of any one calendar month be considered in computing the average detention for another month.

Section C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under section A, paragraphs 1 and 3, or section B, of rule 8.

<sup>2</sup> Rule 3, Section B. *Bunching*.—2. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the railroad company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claims to be presented to railroad company's agent within fifteen (15) days.

or under the "average agreement." The question presented is that of construing and applying the frozen shipments clause. But in order to determine the meaning or effect of that clause, it is necessary that it be read in connection with others.

The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate. The aim of the Code was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable. In fixing the free time the framers of the Code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered.

When they prescribed 48 hours as the free time they fixed the period which, in their opinion, was reasonably required by the average shipper to avail himself of the carrier's service under ordinary circumstances. The framers of the Code made no attempt to equalize conditions among shippers. It was obvious that the period fixed was more than would be required by many shippers most of the time, at least for certain classes of traffic; and that it was less than would be required by some shippers, most of the time, for any kind of traffic. Among the reasons urged for rejecting consideration of the

<sup>\*324</sup>

needs or <sup>\*</sup>merits of the individual shipper, was the fear that, under the guise of exempting shippers from demurrage charges because of conditions peculiar to them, unjust discrimination and rebates to favored shippers might result.

In applying the allowance of free time and the charges for demurrage the single car was treated throughout as the unit, just as it is in the making of carload freight rates. Compare *Darling & Co. v. Pittsburgh, etc., Ry. Co.*, 37 Interst. Com. Com'n R. 401. The effect on the charges of there being several cars involved was, however, provided for by two rules: (1) The bunching rule, under which the shipper is relieved from charges, if by reason of the carrier's fault, the cars are accumulated and detention results. (2) The average agreement rule, under which a monthly debit and credit account is kept of detention and the shipper is relieved of charges for detaining cars more than 48 hours by credit for other cars released within twenty-four hours.

It was urged that the use in this rule of the word "shipment" and not "car," implies that the whole consignment is to be considered in determining whether the delay was caused by the ore being frozen. Obviously the word "shipment" was used because it is not the car, but that shipped in



it, which is frozen. Furthermore the agreed facts do not state whether the cars, which by their number prevented unloading within the 48 hours, came in one consignment or in many.

Excessive receipts of cars is a frequent cause of detention beyond the free time even where shipments are not frozen. From the resulting hardship either the bunching rule or the average agreement ordinarily furnish relief. If the company had not elected to enter into the average agreement, the bunching rule might have afforded relief under the circumstances which attended the deliveries here in question. Since any 1 of the 227 cars on which demurrage was assessed

\*325

might have been unloaded within \*the 48 hours free time, the undue detention was not the necessary result of the ore therein being frozen, but was the result of there being an accumulation of cars so great as to exceed the unloading capacity. Compare *Riverside Mills v. Charleston and Western Carolina Ry. Co.*, 20 Interst. Com. Com'n R. 153, 155; *Central Penn. Lumber Co. v. Director General*, 53 Interst. Com. Com'n R. 523. It does not seem probable that those who framed and adopted the frozen shipment rule and the Interstate Commerce Commission, which approved it, intended therein to depart from the established policy of treating the single car as the unit in applying demurrage charges as well as in applying carload freight rates. Such was the conclusion reached in the informal ruling of the commission to which counsel called attention.

The judgment of the Supreme Court of Pennsylvania is

Reversed.

(253 U. S. 268)

WEIDHORN v. LEVY.

(Argued Jan. 28 and 29, 1920. Decided June 1, 1920.)

No. 203.

1. BANKRUPTCY ⚡440—DECREE SUSTAINING OBJECTION TO REFEREE'S JURISDICTION REVIEWABLE BY PETITION TO REVISE.

A decree of the District Court, sustaining an objection to the jurisdiction of a referee in bankruptcy in a plenary suit to set aside a fraudulent conveyance and dismissing the bill, was reviewable by the Circuit Court of Appeals, by a petition to revise under Bankruptcy Act, § 24b (Comp. St. § 9608), as the decision turned upon a mere question of law.

2. BANKRUPTCY ⚡224—REFEREE NOT A SEPARATE COURT BUT OFFICER OF BANKRUPTCY COURT.

The referee in bankruptcy is not a separate court, nor endowed with any independent judicial authority, but is merely an officer of the court of bankruptcy, with no power, except as conferred by the order of reference.

3. BANKRUPTCY ⚡228 — REFEREE'S FUNCTIONS REVIEWABLE BY DISTRICT COURT.

The judicial functions of a referee in bankruptcy, however important, are always subject to the review of the bankruptcy court.

4. BANKRUPTCY ⚡224—"PROCEEDINGS" SUBJECT TO REFEREE'S JURISDICTION NOT LIMITED TO THOSE REVIEWABLE AS PROCEEDINGS IN BANKRUPTCY.

Under General Order in Bankruptcy No. 12 (172 U. S. 657, 18 Sup. Ct. vii), providing that after an order of reference all proceedings, with certain exceptions, shall be had before the referee, the question whether a suit by the trustee in bankruptcy is a "proceeding" within the referee's jurisdiction is not governed by the distinction between "proceedings in bankruptcy" and "controversy at law and in equity arising in bankruptcy proceedings," as those terms are employed in Bankruptcy Act, §§ 23, 24a, 24b, and 25a (Comp. St. §§ 9607-9609), relative to modes of review.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceedings.]

5. BANKRUPTCY ⚡287(1)—FRAUDULENT CONVEYANCE MUST BE SET ASIDE BY PLENARY SUIT, WHERE PROPERTY IN ADVERSE CLAIMANT'S POSSESSION.

A fraudulent conveyance by a bankrupt more than four months prior to the institution of proceedings in bankruptcy can only be set aside in a plenary suit where the property is in the actual possession of the transferee under an adverse claim of ownership, and not in the custody of the court.

6. BANKRUPTCY ⚡224 — REFEREE WITHOUT JURISDICTION OF PLENARY SUIT TO SET ASIDE FRAUDULENT CONVEYANCES.

Under Bankruptcy Act, § 23b, as amended by Act June 25, 1910 (Comp. St. § 9607), conferring jurisdiction, without the consent of the proposed defendant, on courts of bankruptcy, over suits under section 70e (Comp. St. § 9654) for the recovery of property fraudulently conveyed, the referee has no jurisdiction of such a suit by virtue of a general reference, where the property is not in the custody or control of the court of bankruptcy.

7. BANKRUPTCY ⚡224—SCOPE OF REFEREE'S JURISDICTION STATED.

The jurisdiction and authority of a referee in bankruptcy under a general reference is limited to ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit instituted in the bankruptcy court by Benjamin A. Levy, trustee in bankruptcy of J. Herbert Weidhorn, against Leo Weidhorn and another. A decree of the District Court dismissing the bill (243 Fed. 756) was reversed by the Circuit Court of Appeals (253 Fed. 28, 165 C. C. A. 48), and the defendant named brings certiorari. Reversed, and decree of the District Court affirmed.

Messrs. William M. Blatt and Walter Hartstone, both of Boston, Mass., and L. P. Loving, of Washington, D. C., for petitioner.

Mr. Lee M. Friedman, of Boston, Mass., for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

Upon his voluntary petition, filed in February, 1916, J. Herbert Weidhorn was adjudged

\*269

a bankrupt, and the \*District Court referred the case to a referee under General Order XII (1), 172 U. S. 657, 18 Sup. Ct. vi. Thereafter the trustee in bankruptcy addressed to and filed with the referee a bill in equity against the bankrupt's brother, Leo Weidhorn (the present petitioner), and the Boston Storage Warehouse Company, alleging that certain chattel mortgages, or bills of sale in the nature of mortgages, made by the bankrupt to Leo more than four months before the filing of the petition in bankruptcy, and under which, prior to the filing of the petition, possession of the chattels had passed to the mortgagee and the Storage Warehouse Company, were invalid because made in fraud of creditors, and seeking to set them aside under the statute of Elizabeth and the Bankruptcy Act, § 70e (Comp. St. § 9654), and recover the chattels or the proceeds thereof for the bankrupt estate. Defendant Leo Weidhorn promptly objected to the jurisdiction of the referee, and afterwards answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits, and entered a final decree in favor of the trustee. On review the District Court, considering the jurisdictional question only, vacated the decree and dismissed the bill upon the ground that the referee exceeded his powers under the order of reference. In re Weidhorn, 243 Fed. 756. The trustee petitioned the Circuit Court of Appeals to revise the decree under section 24b; and that court, deeming that the District Court had erred in holding that the referee acted without jurisdiction, reversed its decree dismissing the bill and remanded the cause for further proceedings, including a review of the merits. 253 Fed. 28, 165 C. C. A. 48. A writ of certiorari brings the case here. 248 U. S. 555, 39 Sup. Ct. 11, 63 L. Ed. 419.

[1] It is assigned for error that the Circuit Court of Appeals ought not to have entertained the petition to revise under section 24b (Comp. St. § 9608); the contention being that since the decree complained of was made in a plenary suit the exclusive remedy was by appeal under section 24a. Had the District Court sustained the jurisdiction and passed

\*270

upon the merits the \*point would be well taken, as the court thereby would have determined a "controversy arising in bankruptcy proceedings." Hewit v. Berlin Machine Works, 194 U. S. 296, 300, 24 Sup. Ct. 690, 691 (48 L. Ed. 986). But since the decision turned upon a mere question of law as to whether the

referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under section 24b. Louisville Trust Co. v. Comingor, 184 U. S. 18, 26, 22 Sup. Ct. 293, 46 L. Ed. 413; Schweer v. Brown, 195 U. S. 171, 172, 25 Sup. Ct. 15, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 288, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; Matter of Loving, 224 U. S. 183, 188, 32 Sup. Ct. 446, 56 L. Ed. 725; Gibbons v. Goldsmith, 222 Fed. 826, 828, 138 C. C. A. 252.

Did the referee exceed the authority and jurisdiction conferred upon him by the Bankruptcy Act and the general order of reference?

The following provisions of the act are pertinent: By section 1 (7), Comp. St. § 9585:

"'Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee."

By section 18g (section 9602):

"If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

Section 22 (section 9606) provides that after a person has been adjudged a bankrupt the judge may make a reference to the referee either generally or specially with limited authority to act or to consider and report, and "may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." By section 36 (section 9620):

"Referees shall take the same oath of office as that prescribed for judges of United States courts."

And by section 38a (section 9622):

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to \* \* \*

(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and \*as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

[2, 3] These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

[4] In the general orders established by this court pursuant to the act, under XII (1) provision is made for an order referring a case to a referee:



"And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee." 172 U. S. 657, 18 Sup. Ct. vi.

The question is whether the present suit brought by the trustee in bankruptcy against petitioner was a "proceeding" within the meaning of this provision. We cannot concur in the view of the District Court that this question is governed by the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings," as these terms are employed in sections 23, 24a, 24b, and 25a (Comp. St. §§ 9607-9609); there may be controversies arising in the course of bankruptcy proceedings that are so far connected with those proceedings<sup>\*272</sup> as to be in effect a part of them and capable of summary disposition by the referee under the general order of reference, although because of their nature or because involving a distinct and separable issue they may be reviewable, under the sections cited, by appeal rather than by petition to revise. *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 553, 30 Sup. Ct. 412, 54 L. Ed. 610.

Thus, if the property were in the custody of the bankruptcy court or its officer, any contro-

versy raised by an <sup>\*272</sup>adverse claimant setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. *White v. Schloerb*, 178 U. S. 542, 546, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *Mueller v. Nugent*, 184 U. S. 1, 13, 22 Sup. Ct. 269, 46 L. Ed. 405.

[5] But in the present instance the controversy related to property not in possession or control of the court or of the bankrupt or any one representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (*Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969), and such was the nature of the one that was instituted.

[6, 7] Under the Bankruptcy Act of 1898 as originally passed, an independent suit of this character could not be brought in the District Court in bankruptcy "unless by consent of the proposed defendant." Act July 1, 1898, c. 541, § 23b, 30 Stat. 544, 552; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. Whether under Act Feb. 5, 1903, c. 487, 32 Stat. 797, 798, 800, amending sections 23b and 70e, a suit for

the recovery of property fraudulently transferred by the bankrupt could be brought in a court of bankruptcy without the consent of defendant was a question left undetermined in *Harris v. First National Bank*, 216 U. S. 382, 385, 30 Sup. Ct. 296, 54 L. Ed. 528, but answered in the negative in *Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, 389, 33 Sup. Ct. 125, 57 L. Ed. 264. By Act June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, section 23b was further amended so as to confer jurisdiction upon the courts of bankruptcy without consent of the proposed defendant in suits for the recovery of property under section 70e. The present suit, being of this nature, might have been brought in the

<sup>\*273</sup>

District Court, or <sup>\*</sup>it might have been brought in a state court having concurrent jurisdiction under section 70e as amended.

We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or co-ordinate with those of the court or judge, but subordinate thereto, and he becomes "the court" only by virtue of the order of reference. In the General Orders the word "proceedings" occurs frequently, but never in a sense to include a plenary suit. On the other hand, "proceedings in equity" and "proceedings at law" are specially dealt with in General Order XXXVII, 18 Sup. Ct. x.

The practice is not uniform; we have found no decision by a Circuit Court of Appeals upon the point; and the decisions of the district courts are conflicting. A referee's opinion in *In re Murphy* (1900) 3 Am. Bankr. Rep. 499, 505, upholds his jurisdiction over a plenary proceeding by the trustee to set aside a preferential transfer of property to a creditor. In *In re Shults & Mark* (referee's opinion) 11 Am. Bankr. Rep. 690, a special form of reference having been adopted by the District Court, it was held that jurisdiction was conferred upon the referee over proceedings under section 60b to recover property preferentially transferred and under section 67e to recover property fraudulently transferred. In *In re Steuer* (D. C. Mass.) 104 Fed. 976, 980, a plenary suit to avoid a preference was heard before the referee without objection, and upon petition to review his action the District Court, with some hesitation, directed that a decree issue "as if made originally by

<sup>\*274</sup>

the judge, and <sup>\*</sup>not simply as an affirmance of the decree of the referee." In *In re Scherber*

(D. C. Mass.) 131 Fed. 121, 124, it was found unnecessary to determine whether the referee could proceed over objection to take jurisdiction of a plenary suit to recover a preference. Views adverse to the jurisdiction of the referee in an independent proceeding to avoid a transfer were expressed in *In re Walsh Brothers* (D. C. Iowa) 163 Fed. 352; *In re Carlile* (D. C. N. C.) 199 Fed. 612, 615, 616; *In re Ballou* (D. C. Ky.) 215 Fed. 810, 813, 814; and *In re Overholzer* (referee's opinion) 23 Am. Bankr. Rep. 10.

The point appears to have been overlooked in *Studley v. Boylston Nat. Bank*, 200 Fed. 249, 118 C. C. A. 435; *Id.*, 229 U. S. 523, 525, 526, 33 Sup. Ct. 806, 57 L. Ed. 1313. Other cases cited throw no useful light upon the question.

Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the general orders in bankruptcy a referee, by virtue of a general reference under order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under section 70e, and affecting property not in the custody or control of the court of bankruptcy.

Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.

(253 U. S. 339)

STALLINGS v. SPLAIN, U. S. Marshal.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 534.

1. CRIMINAL LAW §242(10) — EXTRADITION §37—FUGITIVE FROM ANOTHER STATE OR DISTRICT MAY BE ARRESTED WITHOUT WARRANT, EXCEPT THAT OF THE OTHER DISTRICT.

Since a peace officer in the state in which a fugitive from another state is found may arrest the fugitive without warrant and detain him for the reasonable time necessary for requisition proceedings, a marshal of the District of Columbia can arrest there a fugitive indicted in another district on the warrant issued in the other district, which at least would serve as an evidence of reasonable cause to believe a felony had been committed.

2. HABEAS CORPUS §69—DOES NOT GIVE IMMUNITY FROM ARREST ON OTHER PROCESS.

The fact that prisoner is in the custody of the court by virtue of a writ of habeas corpus does not give him immunity from arrest for a different offense or under proceedings for his removal to the district in which he was charged with committing the offense for which he was originally arrested, which proceedings must be brought within a reasonable time after his arrest.

3. HABEAS CORPUS §10—PETITIONER GIVING BAIL ON SUBSEQUENT PROCESS DURING HEARING WILL NOT BE DISCHARGED.

Where a petitioner for habeas corpus to review the legality of his arrest to answer an indictment in another district, pending the hearing on the writ, voluntarily gave bail for his appearance in the other district to answer the charge, he cannot be discharged in the habeas corpus proceedings.

4. HABEAS CORPUS §10—GIVING BAIL FOR APPEARANCE IN DISTRICT OF OFFENSE TERMINATES HABEAS CORPUS TO DETERMINE LEGALITY OF ARREST.

Habeas corpus proceedings to determine the legality of petitioner's arrest without warrant to answer an indictment in another district are fully terminated by giving bail to answer the charges in that district, which accomplishes the purpose for which the arrest was made and entitles petitioner to release.

5. UNITED STATES COMMISSIONERS §4—AUTHORIZED TO RECEIVE FEES AND COMMISSIONS FOR TRANSMISSION TO RECEIVERS.

Since the duties of officers can be prescribed by rule, a United States commissioner is charged with the duty of receiving fees and commissions on applications by land entrymen, to be transmitted to the register and receiver, under Rev. St. § 2294, as amended by Act March 4, 1904 (Comp. St. § 4546), giving affidavits before commissioners the same effect as those before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law, and the Land Office rule, directing proof taken by commissioners to be transmitted to the receiver with the necessary fees and commissions.

6. CRIMINAL LAW §242(6)—DOUBTS AS TO INDICTMENT NOT DECIDED BY COMMITTING MAGISTRATE IN PROCEEDINGS FOR REMOVAL.

Doubts as to the validity of an indictment in another district are not to be resolved by the committing magistrate in proceedings for removal to that district, but by the court which found the indictment after the removal.

Appeal from the Court of Appeals of the District of Columbia.

Habeas corpus proceedings by Leslie C. Stallings against Maurice Splain, United States Marshal in and for the District of Columbia. An order of the Supreme Court of the District of Columbia, dismissing the petition for habeas corpus, and a petition for certiorari in aid thereof, was affirmed by the Court of Appeals for the District (49 App. D. C. 38, 258 Fed. 510), and petitioner appeals. Affirmed.

\*340

\*Mr. William B. Jaynes, of Washington, D. C., for appellant.

Mr. Solicitor General King, for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Stallings was indicted in the District Court of the United States for the District of



Wyoming for embezzling moneys intrusted to him as United States commissioner. Being in the District of Columbia, he was arrested there by Splain, marshal for the District, and was detained to await the institution of proceedings for his removal. In making the arrest Splain had relied, not upon a warrant issued by a commissioner for the District, but upon a bench warrant issued to the marshal for the district of Wyoming on the indictment. Stallings filed immediately in the Supreme Court of the District of Columbia a petition for writ of habeas corpus, contending, for this reason apparently, that the arrest and detention were illegal. The writ issued, Splain produced the body, the hearing on the writ was postponed, and Stallings was admitted to bail.

While he was at large on bail, awaiting a hearing in the habeas corpus proceedings, an affidavit of complaint was filed before a United States commissioner for the District, setting forth the same offenses charged in the indictment. A warrant issued thereon, but Stallings was not arrested. He appeared voluntarily before the commissioner, admitted his identity and that he held the office named at the times the offenses were charged to have been committed, declined to offer any evidence, and moved that he be discharged. The commissioner denied the motion. Then, certified copies of the indictment and other papers having been introduced, he found probable cause. No order was made that Stallings be held to await an application for his removal. He requested that he be admitted to bail for his appearance in Wyoming to answer the charges

<sup>\*341</sup>  
\*against him. The bail was fixed at \$2,000 and was furnished.

After this Splain filed a return to the petition for writ of habeas corpus, setting up the above facts, and Stallings demurred. He also secured, in aid of the habeas corpus proceeding, a writ of certiorari, by which all proceedings before the United States commissioner were certified to the Supreme Court of the District. The case was then heard both upon the demurrer to the petition for writ of habeas corpus and upon the return to the writ of certiorari. The demurrer was overruled; and, Stallings electing to stand thereon, the court dismissed the petition for a writ of habeas corpus and discharged the writ issued thereon. The petition for a writ of certiorari and the writ issued thereon were also dismissed, and the proceedings were remanded to the commissioner for further action. Stallings appealed to the Court of Appeals for the District, which affirmed the final order below. 49 App. D. C. 38, 258 Fed. 510. It is contended here that Stallings should be discharged: (a) Because the original arrest and detention on the bench warrant were illegal and the later proceedings before the commissioner

were without jurisdiction, since he could not legally be rearrested for the same offense until the habeas corpus proceeding had been disposed of; (b) because the affidavit and the indictment fail to charge a crime against the United States.

[1] First. The original arrest and detention were lawful. A person, duly charged with a felony in one state, may, if he flees to another, be arrested, without a warrant, by a peace officer in the state in which he is found, and be detained for the reasonable time necessary to enable a requisition to be made. *Burton v. New York Central Railroad*, 245 U. S. 315, 318, 38 Sup. Ct. 108, 62 L. Ed. 314. See *Kurtz v. Muffitt*, 115 U. S. 487, 504, 6 Sup. Ct. 148, 29 L. Ed. 458. The rule is not less liberal where the fugitive stands charged by an indictment found in one federal district and flees to another.

<sup>\*342</sup>  
See *\*2 Moore on Extradition*, § 540. If the bench warrant issued in Wyoming was not effective as a warrant within the District of Columbia, the possession of it did not render illegal an arrest which could lawfully have been made without it. It would, at least, serve as evidence that Splain had reasonable cause to believe that a felony had been committed by Stallings. *Commonwealth v. Phelps*, 209 Mass. 396, 404, 95 N. E. 868, Ann. Cas. 1912B, 566.

[2] Second. The pendency of the habeas corpus proceeding did not deprive the commissioner of jurisdiction to entertain the application for arrest on the affidavit of complaint. When Splain, in obedience to the writ, brought Stallings before the court, he passed from the custody of the marshal into that of the court, and he remained under its protection and control, although enlarged on bail. *Barth v. Clise*, 12 Wall. 400, 20 L. Ed. 393. But he did not thereby become immune from all other process until the habeas corpus proceedings should have been finally disposed of. *Commonwealth v. Hall*, 9 Gray (Mass.) 262, 69 Am. Dec. 285. Lack of jurisdiction in the commissioner did not follow from the fact that the court had acquired, by virtue of the habeas corpus proceedings, the custody of and control over Stallings. Even if the affidavit of complaint had related to another indictment brought in a different district, the commissioner would have had jurisdiction to entertain it. The question would merely have been whether a second arrest could properly be made where it conflicted with the first. *Peckham v. Henkel*, 216 U. S. 483, 30 Sup. Ct. 255, 54 L. Ed. 579; *In re Beavers* (D. C.) 125 Fed. 988; *Id.* (C. C.) 131 Fed. 366. Here there could be no conflict; for the second arrest, if it had been made, would have been merely for the purpose of carrying out the first. The government was not precluded from taking such additional proceedings as it might deem necessary or advisable to sup-

plement or perfect those originally instituted. If the original arrest was lawful, the detention would remain legal only for the reason—

\*343

able time required to enable \*appropriate removal proceedings to be instituted. Unless the lawful arrest was promptly followed by such proceedings, the prisoner would be entitled to his discharge. In the Matter of Fetter, 23 N. J. Law, 311, 321, 57 Am. Dec. 382. On the other hand, if the original arrest and detention had been illegal, Stallings would not be entitled to his discharge, if before final hearing in the habeas corpus proceedings legal cause for detaining him had arisen through the institution of removal proceedings. Where it appears that sufficient ground for detention exists a prisoner will not be discharged for defects in the original arrest or commitment. *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Iasigi v. Van de Carr*, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045; *Kelly v. Griffin*, 241 U. S. 6, 13, 36 Sup. Ct. 487, 60 L. Ed. 861.

[3] Third. The admission to bail by the commissioner to answer the indictment in the district of Wyoming was upon his own request on advice of counsel. When this bail was given no application had been made to the court for his removal, and there had not even been an order of the commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention and who has been released on bail pending the habeas corpus proceeding. *Sibray v. United States*, 185 Fed. 401, 107 C. C. A. 483. Stallings' position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that under such circumstances a petitioner is not entitled to be discharged on habeas corpus. *Republica v. Arnold*, 3 Yeates (Pa.) 263; *Dodge's Case*, 6 Mart. O. S. (La.) 569; *State v. Buyck*, 1 Brev. (S. C.) 460. Being no longer under actual restraint within the District of Columbia he was not entitled to the writ of habeas corpus. *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

[4] Furthermore by voluntarily giving bail to appear in Wyoming, the purpose of the removal proceedings had been accomplished, and all questions in controversy in the habeas corpus and in the removal proceedings terminated.

\*344

\*Whether his arrest and detention had originally been valid was thereby rendered immaterial. In *re Esselborn* (C. C.)

8 Fed. 904. And likewise the question whether there was a right then to remove him. Compare *Cheong Ah Moy v. United States*, 113 U. S. 216, 5 Sup. Ct. 431, 28 L. Ed. 983; *Ex parte Baez*, 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813.

[5] Fourth. Stallings' contention that he should be discharged, because the indictment failed to charge a crime under the laws of the United States, is also unfounded. He was indicted under section 97 of the Penal Code,<sup>1</sup> which declares that any officer of the United States who shall embezzle any money which may have come into his possession in the execution of such office or under claim of authority as such officer shall be punished. The indictment charges Stallings with having received as commissioner divers sums of money from persons named, to be paid over to the receiver of the land office at Cheyenne, and embezzling the same. It is contended that the money could not have been received as commissioner for transmission, because it is not among the statutory duties of a commissioner. But section 2294 of the Revised Statutes, as amended by Act March 4, 1904, c. 394, 33 Stat. 59 (Comp. St. § 4546), provides that, where applicants for the benefit of the homestead and other land laws make the required affidavits before commissioners of the United States, the proof so made shall have the same effect as if made before the register and receiver, "when transmitted to them with the fees and commissions allowed and required by law." The circular issued by the Land Office in 1905 (33 Land Dec. 480, 481), containing "Suggestions to United States Commissioners," etc., directs that the proofs so taken be "transmitted to the register and receiver with the necessary fees and commissions." And the circular issued in 1915 (44 Land Dec. 350, 352) directs that in "no case should the transmittal thereof be left to the claimant."

[6] Duties of an officer may be prescribed by rule. If the validity of the indictment

\*345

was open to reasonable doubt, \*It was to be resolved, not by the committing magistrate, but, after the removal, by the court which found the indictment. *Beavers v. Henkel*, 194 U. S. 73, 83, 24 Sup. Ct. 605, 48 L. Ed. 882; *Benson v. Henkel*, 198 U. S. 1, 10, 11, 12, 25 Sup. Ct. 569, 49 L. Ed. 919; *Haas v. Henkel*, 216 U. S. 462, 481, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

Affirmed.

<sup>1</sup> Comp. St. § 10265.



(253 U. S. 195)

UNITED STATES *v.* MacMILLAN *et al.*

(Submitted Jan. 23, 1920. Decided June 1, 1920.)

No. 167.

1. CLERKS OF COURTS  $\S$  61—FEES NOT “PUBLIC MONIES OF UNITED STATES,” SO AS TO ENTITLE GOVERNMENT TO ACCRUING INTEREST.

Fees and emoluments, collected by the clerk of a United States District Court required to meet the expenses of his office therefrom and pay over the surplus to the United States, and deposited by him in a bank, are not “public moneys of the United States,” so as to entitle the United States to interest paid thereon by the bank as an increment of its ownership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Money.]

2. CLERKS OF COURTS  $\S$  61 — INTEREST ON FEES AND EMOLUMENTS NOT AN EMOLUMENT TO BE ACCOUNTED FOR.

Interest paid by a bank on a deposit of the fees and emoluments of a clerk of a United States District Court, required by statute to meet the expenses of his office from such fees and emoluments and pay over the surplus to the United States, is not in itself an emolument of the office for which the clerk is liable to account.

Mr. Justice Pitney and Mr. Justice Clarke dissenting.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the United States against Thomas C. MacMillan and another. Judgment for defendants was affirmed by the Circuit Court of Appeals for the Seventh Circuit (251 Fed. 55, 163 C. C. A. 305), and the United States brings error. Affirmed.

See, also, 209 Fed. 266.

\*196

\*Messrs. Solicitor General King and A. F. Myers, of Washington, D. C., for the United States.

\*198

\*Messrs. George T. Buckingham and Marquis Eaton, both of Chicago, Ill., for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The relation of the United States to moneys alleged to have been collected by a clerk of a District Court of the United States as fees or emoluments of his office and the scope of his duty to account semi-annually for the same to the Attorney General so as to fix, if any there was, the surplus due to the United States after paying the expenses of the clerk's office and the clerk's salary as fixed by law, is the general subject here arising for consideration. Section 833, R. S. (Comp. St. § 1394); Act June 28, 1902, 32 Stat. 475, 476; section 839, R. S. (Comp. St.

§ 1404); section 844, R. S. (Comp. St. § 1414).

\*199

\*The controversy originated by a suit commenced by the United States against the defendants in error as clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, and the surety on his official bond to recover \$3,861.05. The right to the relief was based upon averments that during the period from December 27, 1905, to January 27, 1910, the clerk had collected the sum named as interest on the average daily balances of his bank accounts resulting from the deposit by him of the fees and emoluments of his office and of moneys placed by litigants with him to meet payments for costs or otherwise which they might lawfully be required to make during the course of the litigation.

It was further alleged that although the interest thus received constituted a fee or emolument of the office of the clerk, or money held in trust by him for the United States, for the receipt of which he was bound by law semiannually to account, he had failed to do so and was therefore liable.

By plea the defendants admitted the collection by the clerk of the amount sued for as interest on the average daily balances of his bank accounts made up as alleged of moneys derived from fees and emoluments and deposits by litigants under the rules or orders of court. The plea averred that, as required by law, the clerk had made his semi-annual accountings in which, although he did not charge himself with the interest allowed him on his bank balances as stated, he had charged himself with every item constituting a fee or emolument of his office from whatever source due, and after debiting the charge thus made with the proper proportion of his salary and the expenses of his office, had turned the balance, if any there was, into the Treasury of the United States. There was annexed to the plea a copy of the rules of court relating to the placing by litigants of money with the clerk, and the plea alleged that whenever, out of such money, any

\*200

\*charge whether for a fee or emolument or otherwise became due, it was at once paid, so that the amount of that deposit always solely represented money belonging to and held for the account of the depositing litigant to meet payments due by him which might thereafter arise.

To this plea the United States demurred as stating no defense and, after hearing, its demurrer was overruled. 209 Fed. 266. In consequence of an election by the United States to plead no further, the case was submitted for judgment on the petition and plea.

At that time the court had under advisement eight other cases involving the questions arising in this, five being suits by the United States against the clerks of other

United States courts and three, in addition to this, being against the clerk who is defendant here, covering interest collected for different periods. The court disposed of the nine cases in one opinion. It held that as there was no contention as to a default by the clerk concerning any money deposited with him by litigants, that subject would be put out of view. Carefully considering the pleadings, it held that the claim of the United States to the interest rested upon one or the other of two propositions: (1) That the money deposited by the clerk and upon which the interest was allowed was public moneys of the United States and therefore the interest belonged to the United States; (2) that without reference to whether the deposits were public moneys, the interest paid was an emolument for which the clerk was bound to account. Elaborately considering these questions the court decided both against the United States.

Reviewing on error one of the cases against this defendant which was decided, as we have seen, by the trial court along with this, the Circuit Court of Appeals affirmed the trial court in a brief per curiam opinion in which it approved the analysis of the case as made by the trial court and concurred in

\*201

holding decisive the cases in this court which the trial court relied upon. Subsequently when the case now before us came to be heard the ruling in the case just stated was applied to this and the judgment was therefore also affirmed.

In argument here it is suggested by the United States that as the defendant clerk was by exceptional legislation an officer whose salary was specifically appropriated for (Act July 31, 1894, 28 Stat. 162, 204; Act March 2, 1895, 28 Stat. 764, 806; Act Aug. 24, 1912, 37 Stat. 417, 465), therefore the principles passed upon below are not necessarily decisive. But aside from the disregard of the admissions resulting from the pleadings which the suggestion involves and the entire absence of even an intimation that such a contention was raised in either of the courts below, we put the belated suggestion out of view, since as it is not disputed that the defendant clerk was under obligation to meet the expenses of his office from the fees and emoluments thereof and to pay over to the United States only the surplus resulting, we think the distinction assumed to arise from the proposition stated makes no difference in the application of the principles which the court below held to be conclusive and the soundness of which we are now therefore required to pass upon.

[1] As we agree with the lower court that the two propositions decided by the trial court embraced the whole case, we are thus brought, first, to determine whether the fees and emoluments collected by the clerk and deposited by him in bank and upon which in-

terest was allowed him were public moneys of the United States, thus entitling the United States to the interest as an increment of its ownership. That it was not is so completely foreclosed as to cause it to be only necessary to consider the previous ruling on the subject.

In *United States v. Mason*, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, the court was called upon to determine the validity of the

\*202

action of a Circuit Court of the United States in quashing three indictments against the clerk of a Circuit Court of the United States for the "embezzlement of certain moneys of the United States," which moneys were a portion of the surplus of fees and emoluments of his office over and above the compensation and allowances authorized by law to be retained by him. The indictments were based, and the sole reliance to sustain them and thus reverse the court below was rested, upon sections 5490 and 5497, Revised Statutes (Comp. St. §§ 10257, 10264), with the amendments made by Act Feb. 3, 1879, c. 42 (20 Stat. 280 [Comp. St. § 10265]), each of which sections exclusively dealt with embezzlement of "public moneys." Whether, therefore, the particular moneys which were there in question, being derived from fees and emoluments of the clerk, were public moneys required necessarily to be decided. Reviewing historically the legislation covering clerks of courts of the United States which had been previously recapitulated in *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, it was pointed out, first, that originally clerks of courts were not salaried, but were remunerated by the right to collect and retain established fees and emoluments and that under such legislation the sums collected by the clerks were in no sense public moneys of the United States, but were moneys of the clerks held by them in their personal capacity in payment for their official services.

Coming to state the evolution in the situation by which in time it came to pass that a limit was placed on the amount of compensation which a clerk should annually receive and consequently making it his duty to account for his fees and emoluments and to turn over to the United States the surplus, if any, remaining after the payment of his compensation and the expenses of his office, the court observed (218 U. S. 523, 524, 31 Sup. Ct. 31, 54 L. Ed. 1133):

"The plain object of this statute was to limit the amount which the clerk was to retain and to require an accounting, an audit of expenses,

\*203

and a payment of the surplus. Otherwise the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when



he was to make his return, depended upon the amount of the fees, the amount of the expenses and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees there would be nothing to pay. The amount payable was to be determined when the return was made."

Testing the possible application of the statutes dealing with the embezzlement of public moneys to the rights and duties of a clerk to collect the fees and emoluments of his office and to make use of them as authorized by law, it was pointed out that such application could not be made because of the incompatibility between the powers and duties of the clerk, on the one hand, and the provisions of the statutes relied upon, on the other. This incongruity was aptly illustrated by the statement which follows dealing with the duties of the clerk and the impossibility of applying to them the prohibitions of one of the statutes in question (218 U. S. 525, 31 Sup. Ct. 32, 54 L. Ed. 1133):

"They lay outside of the prohibition of section 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting and to pay over the surplus if the fees exceeded the total amount allowed him."

Again marking the broad line which lay between public money and the clerk's fees and emoluments and his right to collect and disburse the same, the court declared (218 U. S. 529, 31 Sup. Ct. 33, 54 L. Ed. 1133):

"There has thus been established a distinct system with \*respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them."

And once more emphasizing the distinction it was said (218 U. S. 531, 31 Sup. Ct. 34, 54 L. Ed. 1133):

"The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

Indeed the decisive principles which were thus announced in the Mason Case were but a reiteration and application of the general

doctrine on the subject announced in *United States v. Hill*, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, where it was in express terms pointed out that—

"A clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as fees and emoluments of his office, with the obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law."

[2] Conclusively disposing as these cases do of the contention of the government as to public moneys of the United States, it leaves only for consideration the question of whether the interest on the sum of the fees and emoluments deposited by the clerk in bank was in and of itself an emolument for which he was

liable to account. But that \*question is virtually also foreclosed in view of what was held in the Mason Case, since the individual character of the bank deposit as there defined and the right to make it necessarily causes the increment of such deposit, that is, the interest, to partake of the character of the principal. And besides, aside from the ruling in the Mason Case, it had been previously held that a sum collected by a clerk for a service not pertaining to his office or provided for in the schedule of fees allowed him for official services was not a fee or emolument in the sense of the statute. *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627.

Although at the outset we eliminated from consideration liability for interest on money of litigants deposited with the clerk under the rules of court because not embraced in the claim of money or property of the United States upon which all the government contentions here rest, in leaving the case we observe that the question of the liability of the clerk to pay interest to litigants on money deposited by them is in a large degree covered by the rules of court annexed to the plea, which permit in the cases specified an application of a litigant to the court to direct the allowance of such interest and to provide for its payment by the clerk when the request is granted.

In conclusion we direct attention, as was done in the Mason Case and as did the trial court in this case, to the incompatibility which would result, on the one hand, from enforcing an absolute obligation on the part of the clerk to account for all the fees and emoluments of the clerk's office whether collected or not as well as his duty to defray the expenses of his office out of such revenue, and the upholding, on the other hand, of the conflicting theory that the fees and emoluments were public moneys and the power of the clerk to deal with them accordingly limited.

Affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent.

(253 U. S. 300)

## In re PETERSON.

(Argued March 15, 1920. Decided June 1, 1920.)

No. 28.

1. MANDAMUS  $\hookrightarrow$ 4(1)—PROHIBITION  $\hookrightarrow$ 3(2)  
—LIES TO PREVENT PROCEEDINGS DENYING TRIAL BY JURY, NOTWITHSTANDING RIGHT OF REVIEW BY EXCEPTIONS.

If proceedings pursuant to the appointment of an auditor in an action at law to determine what matters are in dispute and to express an opinion on such matters would deprive a party of his right to a trial by jury, the Supreme Court has jurisdiction to entertain an application for writs of mandamus or prohibition, or both, notwithstanding the objecting party's right to protect himself by exceptions, which would be subject to review.

2. REFERENCE  $\hookrightarrow$ 8(1)—APPOINTMENT OF AUDITOR HELD AUTHORIZED IN CASE INVOLVING ACCOUNTS, IF POWER EXISTED TO MAKE APPOINTMENT.

Assuming the power of the District Court to appoint an auditor in an action at law to determine what matters are in dispute and express an opinion thereon, such appointment was justified in an action for a balance due on an account annexed for coal sold and delivered, containing 298 items, in which defendants set up another account containing 402 items, claimed to have arisen out of 123 different deliveries of cargoes or partial cargoes of coal on 91 different days during a period of 11 months, involving claims for penalties, commissions, cash discounts, and allowances on account of freight.

3. JURY  $\hookrightarrow$ 31(3)—RIGHT OF JURY TRIAL DOES NOT PREVENT CHANGES IN PROCEDURE AND PRACTICE.

Const. Amend. 7, providing that the right of trial by jury shall be preserved, does not require that old forms of practice and procedure be retained, or prohibit the introduction of new methods for determining what facts are in issue or the introduction of new rules of evidence.

4. JURY  $\hookrightarrow$ 12(3)—RIGHT OF JURY TRIAL DOES NOT EXIST, EXCEPT AS TO ISSUES OF FACT.

There is no right in a civil case to a trial by jury, unless and except so far as there are issues of fact to be determined.

5. JURY  $\hookrightarrow$ 31(3)—RIGHT NOT INFRINGED BY REQUIRING OATH OF PARTY TO FACTS RELIED ON.

It does not infringe the constitutional right to a trial by jury to require, with a view to formulating the issues, an oath by each party to the facts relied on.

6. JURY  $\hookrightarrow$ 31(8)—RIGHT NOT INFRINGED BY REFERENCE TO DETERMINE WHAT MATTERS ARE IN DISPUTE.

A compulsory reference of an action at law involving long accounts to an auditor, to separate the matters in dispute from those not in dispute, does not infringe the constitutional

right to a jury trial, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury.

7. JURY  $\hookrightarrow$ 34(2)—RIGHT NOT INFRINGED BY REQUIRING AUDITOR TO EXPRESS OPINION ADMITTED AS PRIMA FACIE EVIDENCE.

An order referring an action at law to an auditor for a preliminary hearing, with a view to separating the matters in dispute from those not in dispute, is not unconstitutional, as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion on the matters in dispute, though the report of the auditor, unless rejected by the court, will be treated as prima facie evidence.

8. JURY  $\hookrightarrow$ 34(2)—ORDER OF COURT EXTENDING PRESUMPTION OF REGULARITY TO OFFICIAL ACT NOT UNCONSTITUTIONAL.

An order of a court, like a statute, is not unconstitutional, because it endows an official act or finding with a presumption of regularity or of verity.

9. REFERENCE  $\hookrightarrow$ 7(1)—FEDERAL COURTS MAY APPOINT AUDITOR TO DETERMINE WHAT MATTERS ARE IN DISPUTE AND EXPRESS OPINION.

In the absence of legislation to the contrary, federal courts have inherent power to order a preliminary hearing before an auditor in an action at law, with a view to determining what matters are in dispute, and to require the auditor to express an opinion on the matters in dispute.

10. COSTS  $\hookrightarrow$ 158—EXPENSE OF PRELIMINARY HEARING BEFORE AUDITOR MAY BE TAXED.

In the absence of a federal or state statute or rule of court excluding such items, a federal District Court referring an action at law to an auditor for a preliminary hearing may tax the expenses of such reference, including the fees of the auditor and his stenographer, as costs.

11. COURTS  $\hookrightarrow$ 357—STATE PRACTICE RESPECTING TAXING OF COSTS WILL BE FOLLOWED.

In the absence of any act of Congress on the subject, the state practice, if any, will be followed in the federal courts with respect to taxing as costs the expense of a preliminary hearing before an auditor in aid of a jury trial in an action at law.

12. COSTS  $\hookrightarrow$ 32(1)—EXPENSE OF PRELIMINARY HEARING BEFORE AUDITOR CANNOT BE TAXED AGAINST PREVAILING PARTY.

Under the rule of practice long prevailing, and confirmed by Rev. St. § 983 (Comp. St. § 1624), that in actions at law the prevailing party is entitled to costs as of right, the expenses of a preliminary hearing before an auditor in aid of a jury trial in an action at law cannot be taxed in whole or in part against the prevailing party.

13. COURTS  $\hookrightarrow$ 357—RULE ALLOWING COSTS TO PREVAILING PARTY PREVAILS OVER STATE PRACTICE.

The rule of practice, confirmed by Rev. St. § 983 (Comp. St. § 1624), that in actions at law



the prevailing party is entitled to costs as of right, will prevail over a contrary rule of the state courts.

**14. MANDAMUS 3(11) — PROHIBITION 3(1)—ERROR IN ORDER WITH RESPECT TO COSTS OF REFERENCE WILL NOT SUPPORT.**

While an order referring an action at law to an auditor for a preliminary hearing was erroneous, so far as it provided that the expense of the hearing should be paid by one or both of the parties in accordance with the determination of the trial judge, instead of providing that the expense should abide the result of the action, the error does not require the granting of writs of mandamus or prohibition, as redress may be had through application for a modification of the order, or after final judgment by writ of error.

Mr. Justice McKenna, Mr. Justice Pitney, and Mr. Justice McReynolds dissenting.

On Petition for Writ of Mandamus and/or Writ of Prohibition.

Original petition by Walter Peterson, as receiver of the Interstate Coal Company, Incorporated, for writs of mandamus and/or prohibition directed to Augustus N. Hand, Judge of the District Court for the Southern District of New York. Writs denied.

See, also, 40 Sup. Ct. 178, 64 L. Ed. —.

**\*301**

\*Mr. Abram J. Rose, of New York City, for petitioner.

**\*303**

\*Mr. George Zabriskie, of New York City, for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is a petition for a writ of mandamus and/or prohibition brought by Walter Peterson, receiver of the Interstate Coal Company, against the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York. The facts and the specific relief sought are these:

**\*304**

\*Peterson had brought an action at law in that court against Arthur Sidney Davison to recover a balance of \$21,014.43, alleged to be due for coal sold and delivered as shown by a long schedule annexed. The answer substantially admitted the items set forth in the schedule filed by plaintiff, but denied that it presented a full account of the transactions between the parties, and alleged that there were other deliveries of coal and other payments which the defendant had made, and also that he was entitled to additional allowances. It further alleged, by way of counterclaim, that the plaintiff was indebted to him for failure to perform its contracts for coal in the sum of \$9,999.10. In response to a demand for a bill of particulars, defendant filed schedules containing more than 200 items which he proposed to establish by way of defense.

Upon motion of defendant and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. 625), with instructions—

"to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties, and make and file a report in the office of the clerk of this court, with a view to simplifying the issues for the jury, but not to finally determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial, and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses, the expense of the auditor, including the expense of the stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge."

The auditor was further ordered to report on certain facts under 10 classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute, and also to set forth the detailed facts on which the specific claims

**\*305**

made were rested; \*but the auditor was also thereby required to express his opinion on disputed issues thus:

"6. The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"7. His opinion as to the net amount due on each invoice of coal sold and delivered to defendant."

Thereupon application was made here for leave to file this petition. It prays that Judge Hand and the auditor named be prohibited from proceeding under the order appointing him; and it prays, also, that Judge Hand, or such other judge who may at the time hold the trial term of that court, be commanded to restore the case to the trial calendar, and that the same be tried in the regular and usual way. Leave to file the petition was granted (40 Sup. Ct. 178, 64 L. Ed. —), and an order to show cause issued. The petitioner insists that the District Court is without power to make the order appointing the auditor, and that proceedings thereunder would violate the Seventh Amendment to the Federal Constitution.

[1] First. Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him, and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used

merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U. S. 231, 239, 38 Sup. Ct. 497 (62 L. Ed. 1094) "be dealt with now, before the plaintiff is put to the diffi-

\*306

culties \*and the courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition.

[2] Second. The question presented is one of power in the District Court. If, under any circumstances, it could appoint an auditor with the duties here prescribed without the consent of the parties, the facts clearly warranted such action in this instance. The plaintiff sued for a balance alleged to be due on an account annexed containing 298 items. The defendant set up another account containing 402 items. Included in the latter, besides certain charges against defendant for additional deliveries, were over 30 cash items of credit not allowed for in the plaintiff's account. These 402 items were alleged to arise out of 123 different deliveries of cargoes (or partial cargoes) of coal made on 91 different days during a period of 11 months. The coal delivered was of various kinds and the invoice prices for the same kind differed from time to time. In respect to most of these deliveries, there were claims for allowances by way of penalties, commissions, and cash discounts; and, as to some, there were claims for allowances on account of freight.

The District Court found that, in order to render possible an intelligent consideration of the case by court and jury, it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy, and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions, the auditor would be required, not merely to examine books, vouch-

\*307

ers, and \*other papers, and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy judgment on the disputed items, would serve also to narrow the field of controversy. For such a tentative trial acts as a sifting process, by which misunderstandings and misconceptions as to facts are frequently removed. In the course of it many contentions or assumptions made by one party or the other are abandoned. Agreement is thus reached as

to some of the facts out of which liability is alleged to arise, even when the items to which they relate remain in dispute. See *Fair v. Manhattan Ins. Co.*, 112 Mass. 329.

The order expressly declared that the auditor should not "finally determine any of the issues in this action, the final determination of all issues of fact to be made by the jury at the trial"; but it did not provide affirmatively what use should be made of the report at the trial. It may be assumed that, if accepted by the court, the report would be admitted at the trial before the jury as *prima facie* evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report, being evidence sufficient to satisfy the burden of proof (*Wyman v. Whicher*, 179 Mass. 276, 60 N. E. 612), would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

Third. Prior to the adoption of the federal Constitution there did not exist in England, or so far as appears in any of the colonies, any officer, permanent or temporary,

\*308

\*who, in connection with trials by jury, exercised the powers of an auditor above described. An official called "auditor" had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies; but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment *quod computet* had been entered. But the parties were entitled to a jury trial before the interlocutory judgment was rendered; and further issues of fact arising before the auditor were not passed upon by him, but were certified to the court for trial by a jury. The use of this form of action was limited to cases where the defendant was under obligation to account to the plaintiff as guardian, bailiff, or receiver of his property.<sup>1</sup> In Maryland, by Acts 1785, c. 80, § 12, the power of the court to appoint auditors was extended to all cases in which it might be necessary to examine and determine accounts; but the jury trial was not affected thereby, for the proceedings thereon were to be "as in cases of account."<sup>2</sup> In Connecti-

<sup>1</sup> See Prof. Langdell, 2 Harvard Law Review, 241, 251-255; *Holmes v. Hunt*, 122 Mass. 505, 512, 23 Am. Rep. 381.

<sup>2</sup> See *United States v. Rose*, 2 Cranch, C. C. 567, Fed. Cas. No. 16,193; *Barry v. Barry*, 3 Cranch, C. C. 120, Fed. Cas. No. 1,060; *Bank of United States v. Johnson*, 3 Cranch, C. C. 223, Fed. Cas. No. 919.



cut auditors were appointed by the court in actions of "book debt," and the same practice was early introduced in Vermont and other states; but in this action the report of the auditor, if accepted by the court, is a substitute for the jury and operates to deter-

\*309

mine the issues of fact.<sup>3</sup> In New York \*actions on long accounts are determined now, as in colonial days, by referees, instead of by a jury.<sup>4</sup>

The office of auditor, with functions and powers like those here in question, was apparently invented in Massachusetts. It was introduced there by chapter 142 of the Acts of the Legislature of the year 1818, and as a part of the judicial machinery it has received the fullest development in that state. No act of Congress has specifically authorized the adoption of the practice in the federal courts. We have therefore to decide, not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the District Court as a trial court.

[3] Fourth. The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. *Walker v. New Mexico & Southern Pacific Railroad*, 165 U. S. 593, 596, 17 Sup. Ct. 421, 41 L. Ed. 837. Compare *Twining v. New Jersey*, 211 U. S. 78, 101, 29 Sup. Ct. 14, 53 L. Ed. 97. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Chang-

\*310

es in these may be made. New de\*vices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.<sup>5</sup> Indeed, such changes are essential to the pres-

The report was not admitted before the jury as prima facie evidence of the truth of the statements or conclusions of the auditor. *McCullough v. Groff*, 2 Mackey (D. C.) 361, 366.

<sup>3</sup> *Sulzer v. Watson* (C. C.) 39 Fed. 414; Connecticut General Statutes, § 5752 (Ed. of 1918); Act of Vermont, October 21, 1782, Slade's Vermont State Papers, 456; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; Missouri, Wagner's Stat. 1041, § 18; *Edwardson v. Garnhart*, 56 Mo. 81.

<sup>4</sup> *Steck v. C. F. & I. Co.*, 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67. This fact has no bearing on the constitutional question involved here. The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute. *United States v. Womson*, 1 Gall. 5, 20, Fed. Cas. No. 16,750; *Capital Traction Co. v. Hof*, 174 U. S. 1, 8, 19 Sup. Ct. 580, 43 L. Ed. 873. See also *United States v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121; *Howe Machine Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784; *Sulzer v. Watson* (C. C.) 39 Fed. 414; *United States v. Wells* (D. C.) 203 Fed. 146, 149.

In *Davis v. St. Louis & S. F. Ry. Co.* (C. C.) 25 Fed. 786, a case involving a long account, a referee was appointed to report, apparently to determine the facts in accordance with the practice prevailing in Kansas where the court was sitting.

<sup>5</sup> See "Trial by Jury and the Reform of Civil Procedure," by Prof. A. W. Scott, 31 Harvard Law Review, 669.

ervation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

[4-6] In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. *United States v. Gilmore*, 7 Wall. 491, 494, 19 L. Ed. 282; *Tucker v. United States*, 151 U. S. 164, 168, 14 Sup. Ct. 299, 38 L. Ed. 112. No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury to require, with a view to formulating the issues, an oath by each party to the facts relied upon. *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. Ed. 194. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. In view of these decisions, it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

[7, 8] Nor can the order be held unconstitutional, as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be ad-

\*311

mitted at the jury trial as \*evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. *Marx v. Hanthorn*, 148 U. S. 172, 182, 13 Sup. Ct. 508, 37 L. Ed. 410; *Turpin v. Lemon*, 187 U. S. 51, 59, 23 Sup. Ct. 20, 47 L. Ed. 70; *Reitler v. Harris*, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497. In *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 430, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, it was held that the provision in section 16 of the Interstate Commerce Act (Comp. St. § 8584), making the findings and order of the Commission prima facie evidence of the facts therein stated in suits brought to enforce reparation awards, does not infringe upon the right of trial by jury. See also *Mills v. Lehigh Valley Railroad*, 239

U. S. 473, 35 Sup. Ct. 888, 59 L. Ed. 1414; Chicago, etc., *R. R. v. Jones*, 149 Ill. 361, 382, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278. In the Meeker Case this court relied especially upon *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381, and called attention to the fact that there the statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury.<sup>6</sup> The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the In-

\*312

terstate Commerce \*Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court.

That neither the hearing before the auditor, nor the introduction of his report in evidence, abridges in any way the right of trial by jury was the conclusion reached in 1902 in the district of Massachusetts in *Primrose v. Fenno*, 113 Fed. 375, and 119 Fed. 801, 56 C. C. A. 313, the first reported case in which an auditor was appointed with the powers here conferred. The practice there established has been followed in the Southern District of New York, *Vermeule v. Reilly*, 196 Fed. 226; and in the Eastern District of Tennessee, *United States v. Wells*, 203 Fed. 146.

Fifth. There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon District Courts power to make the order. There is here, unlike *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.

[9] Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 87-90. This power includes authority to appoint persons unconnected with the court to aid judges in

the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts,

\*313

when sitting in equity, by \*appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon—these are among the purposes for which such aids to the judges have been appointed. *Kimberly v. Arms*, 129 U. S. 512, 523, 9 Sup. Ct. 355, 32 L. Ed. 764. Whether such aid shall be sought is ordinarily within the discretion of the trial judge; but this court has indicated that where accounts are complex and intricate, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself. *Heirs of P. F. Dubourg de St. Colombe v. United States*, 7 Pet. 625, 8 L. Ed. 807; *Chicago, Milwaukee & St. P. Ry. v. Tompkins*, 176 U. S. 167, 180, 20 Sup. Ct. 336, 44 L. Ed. 417. Of the appointment made in *Field v. Holland*, 6 Cranch, 8, 21 (3 L. Ed. 136), Mr. Chief Justice Marshall said:

"It is a reference to 'auditors,' a term which designates agents or officers of the court, who examine and digest accounts for the decisions of the court. They do not decree, but prepare material on which a decree may be made."

And in *Railroad Co. v. Swasey*, 23 Wall. 405, 410 (23 L. Ed. 136), Mr. Chief Justice Waite said of the master's report:

"Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

What the District Judge was seeking when he appointed the auditor in the case at bar was just such aid. He required it himself, because without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues sub-

\*314

mitted for their determination and \*of directing their attention to the matters actually in issue. *United States v. Reading Railroad*, 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138. The hearing and report were also essential as shown above to enable the jury to perform their specific duty. Owing to the difference in the character of the proceedings and of the questions ordinarily involved, the occasion for seeking such aid as is afforded to a judge by special masters, auditors, or examiners arises less frequently at law than in equity.

<sup>6</sup> Acts making findings in the tentative hearing before an auditor prima facie evidence were held not to infringe the right of trial by jury in *Maine, Howard v. Kimball*, 65 Me. 303, 327; and in *New Hampshire, Doyle v. Doyle*, 56 N. H. 567; *Perkins v. Scott*, 57 N. H. 55. A different conclusion was reached in *Francis v. Baker*, 11 R. I. 103, 23 Am. Rep. 424, and *Plimpton v. Town of Somerset*, 33 Vt. 283.



A compulsory reference with power to determine issues is impossible in the federal courts because of the Seventh Amendment, *United States v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121; but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. *Heckers v. Fowler*, 2 Wall. 123, 17 L. Ed. 759. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court.

[10, 11] Sixth. The clause in the order which provides that "the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge" requires special

\*315

consideration. As Congress<sup>7</sup> has made \*no provision for paying from public funds either the fees of auditors or the expense of the stenographer, the power to make the appointment without consent of the parties is practically dependent upon the power to tax the expense as costs. May the compensation of auditor and stenographer be taxed as costs; and, if so, may the expense be imposed in the discretion of the trial court upon either party?

Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity rule 68 (33 Sup. Ct. xxxviii)

<sup>7</sup> In Massachusetts the expense of the auditor was prior to 1878 taxed in all cases as costs to be paid by the defeated party. See Acts of 1818, c. 142; Rev. Stat. (1836) c. 96, § 31; Gen. Stat. (1860) c. 121, § 50; Act of March 16, 1867, c. 67; Act of June 6, 1873, c. 342. By Act of April 23, 1873, c. 173, the expense of the auditor in cases tried in the superior or in the Supreme Judicial Court was made payable by the county. See also Rev. Laws (1902) c. 165, § 60; Act of June 5, 1911, c. 237; Acts of 1914, c. 576.

In Maine the fees of the auditor were prior to 1897 taxed as costs in favor of the prevailing party. Laws (1821) c. 59, § 25; Acts of 1826, c. 347, § 1; Rev. Stat. (1883) c. 82, § 70. Since the Act of March 12, 1897, c. 224, the fees and necessary expenses of the auditors are paid by the county.

In New Hampshire the fees of the auditor are also taxable as costs in favor of the prevailing party; but the court may now in its discretion, order them paid by the county. Act of June 23, 1823, c. 19, § 1; Act of July 20, 1876, c. 35, § 4; Pub. Stat. (1901) c. 227, § 7.

provides for taxing the fees of masters, and rule 50 (33 Sup. Ct. xxxii) for the expense of a stenographer. Both rules embody substantially the practice which had theretofore prevailed generally in equity proceedings, and which in the Southern District of New York had been followed not only in equity, *American Diamond Drill Co. v. Sullivan Machine Co.* (C. C.) 32 Fed. 552; *Id.*, 131 U. S. 428, 9 Sup. Ct. 794, 33 L. Ed. 217; *Brickill v. Mayor, etc., of City of New York* (C. C.) 55 Fed. 565; *Hohorst v. Hamburg-American Packet Co.* (C. C.) 76 Fed. 472; but also in admiralty, *The E. Luckenbach* (D. C.) 19 Fed. 847; *Rogers v. Brown* (D. C.) 136 Fed. 813. The expense of printing the records and briefs in the trial court has been

\*316

made by rule of court in \*several of the circuits taxable as costs against the defeated party, *Hake v. Brown* (C. C.) 44 Fed. 734. Compare *Kelly v. Springfield Ry. Co.* (C. C.) 83 Fed. 183; *Tesla Electric Co. v. Scott* (C. C.) 101 Fed. 524. As early as 1843 Mr. Justice Story, sitting at circuit in *Whipple v. Cumberland Cotton Manufacturing Co.*, 3 Story, 84, Fed. Cas. No. 17,515, approved, in an action at law for damages, although not specially authorized by any rule, the order of a survey, as "necessary for the true understanding of the cause on both sides," and ordered the expense paid by them. In cases in which courts have refused to tax as costs copies of stenographer's minutes and other expenditures incident to the litigation, attention has been called to the fact that they were made for the benefit of the party, as distinguished from expenditures incurred under order of the court, to make possible or to facilitate its consideration of the case. *Stallo v. Wagner*, 245 Fed. 636, 158 C. C. A. 64; *New Hampshire Land Co. v. Tilton* (C. C.) 29 Fed. 764. But see *Bridges v. Sheldon* (C. C.) 7 Fed. 17, 42.

The allowance of costs in the federal courts rests, not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Mr. Justice Woodbury in *Hathaway v. Roach*, 2 Woodb. & M. 63, Fed. Cas. No. 6,213; Mr. Justice Nelson in *Costs in Civil Cases*, 1 Blatchf. 652, Fed. Cas. No. 18,284; *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463. In *Hathaway v. Roach*, 2 Woodb. & M. 67, Fed. Cas. No. 6,213, it is said to have been the usage of the federal courts—

"to conform to the state laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject."

And in *The Baltimore*, 8 Wall. 390, 391 (19 L. Ed. 463) this court stated that—

"The costs taxed in the Circuit and District Courts were the same as were allowed at that

time in the courts of the state, including such matters as travel and attendance of the parties, fees for copies of the case, and abstracts for

\*317

the hearing, compensation for the \*services of referees, auditors, masters, and assessors, and many other matters, not embraced in the fee bills, since passed by Congress."<sup>8</sup>

Neither the Act of February 26, 1853, c. 80, 10 Stat. 161, Rev. Stats. § 983 (Comp. St. § 1624), nor any later act of Congress or rule of court, deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the federal courts. See *Huntress v. Town of Epsom* (C. C.) 15 Fed. 732. But, so far as appears, the preliminary hearing before an auditor in aid of jury trials is not a part of the judicial machinery of that state. The nearest analogy to it is the reference had in actions at law on long accounts as a substitute for a jury trial. The expense of the compulsory reference in such actions is so taxable. Code Civ. Proc. § 3256. As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case.

[12, 13] Seventh. The further question is whether the District Court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law followed by the federal courts since their organization, preclude its adoption.

While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of dis-

\*318

cretion, it has been uniformly held \*that in actions at law the prevailing party is entitled to costs as of right (compare *United States v. Schurtz*, 102 U. S. 378, 407, 26 L. Ed. 167, 219), except in those few cases where by express statutory provision or by established principles costs are denied.<sup>9</sup> It has also been generally held that this right to costs of the prevailing party in actions at law extends to the entire costs in the trial court, and that the court is without power to make an apportionment based upon the fact that the prevailing party has failed in part of

his claims, or that for other reasons only a part or none of the costs should in fairness be allowed.<sup>10</sup> This rule of practice established by long usage is confirmed by the language of section 983 of the Revised Statutes. It would, therefore, be held to prevail over a rule, if any, to the contrary established in the courts of the state. But the practice in the courts of New York appears to be in this respect in entire harmony with that of the federal courts.<sup>11</sup> In *Whipple v. Cumberland Cotton Manufacturing Co.*, supra, the expense of the survey ordered by the court was imposed by it equally on the two parties; and the same disposition was made in *Primrose v. Fenno*, supra, where the auditor had been appointed at the instance of the court without objection by either party. But

\*319

in *Houlihan v. Corporation of St. Anthony* (C. C.) 173 Fed. 496, and 184 Fed. 252, 106 C. C. A. 394, where the auditor was appointed by consent of the parties, the same court taxed both the auditor's and the stenographer's fees against the losing party, holding that it had discretion, if it was not obliged to do so; and a petition for writ of certiorari was denied by this court. 220 U. S. 613, 31 Sup. Ct. 717, 55 L. Ed. 609.

[14] Although the order was erroneous in declaring that the expense of the auditor shall, instead of abiding the result of the action, be paid by one or both of the parties in accordance with the determination of the trial judge, the error does not require that either of the extraordinary remedies applied for here be granted. If the petitioner deems himself prejudiced by the error he may get redress through application to the District Court for a modification of the order, or after final judgment on writ of error, from the Circuit Court of Appeals. In *re Morrison*, 147 U. S. 14, 26, 13 Sup. Ct. 246, 37 L. Ed. 60. The petition for writs of mandamus and/or prohibition is

Denied.

Mr. Justice McKENNA, Mr. Justice PITNEY, and Mr. Justice McREYNOLDS dissent.

<sup>10</sup> *Crabtree v. Neff*, 1 Bond, 554, Fed. Cas. No. 3,315; *Hooe v. Alexandria*, 1 Cranch, C. C. 98, Fed. Cas. No. 6,667; *Bartels v. Redfield* (C. C.) 47 Fed. 708; *Trinidad Asphalt Paving Co. v. Robinson* (C. C.) 52 Fed. 347; *United States v. Minneapolis, etc., Ry. Co.* (D. C.) 235 Fed. 951, 953; *West End St. Ry. Co. v. Malley*, 246 Fed. 625, 627, 158 C. C. A. 581; *Sears, Roebuck & Co. v. Pearce*, 253 Fed. 960, 962, 165 C. C. A. 402; *Wheeler v. Taft* (C. C. A.) 261 Fed. 978.

<sup>11</sup> The general rule that in actions at law the prevailing party is entitled as of right to the taxable costs prevails in New York; and there is a further provision that when plaintiff demands a judgment for a sum of money only, the plaintiff, if prevailing, is entitled to the costs whether the suit be one at law or in equity. *Murtha v. Curley*, 92 N. Y. 359; *Norton v. Fancher*, 92 Hun, 463, 36 N. Y. Supp. 1032.

<sup>8</sup> *Shreve v. Cheesman*, 69 Fed. 785, 789, 16 C. C. A. 413. See also *Scatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639; *Michigan Aluminum Foundry Co. v. Aluminum Co. of America* (C. C.) 190 Fed. 903, 904.

<sup>9</sup> For instance, Rev. Stat. § 968 (Comp. St. § 1609), denying costs to a plaintiff or petitioner who recovers less than \$500.



(253 U. S. 245)

EVANS v. GORE, Acting Collector of Internal Revenue.

(Argued March 5, 1920. Decided June 1, 1920.)

No. 654.

## 1. JUDGES ⇨42—SUPREME COURT CANNOT DECLINE JURISDICTION BECAUSE OF INTEREST IN QUESTION OF INDIVIDUAL MEMBERS.

The Supreme Court cannot decline or renounce jurisdiction to review the judgment in an action involving the question as to the power of Congress to tax the income of a federal judge, including his salary, because of the individual relation of the members of the court to such question.

## 2. JUDGES ⇨22(7)—CONSTITUTIONAL PROHIBITION OF DIMINUTION OF SALARY MUST NOT BE CONSTRUED RESTRICTIVELY.

Const. art. 3, § 1, providing that judges shall receive a compensation which shall not be diminished during their continuance in office, imposes such limitation in the public interest and not for the benefit of the judges, and must be construed in accord with its spirit and the principle on which it proceeds, and not restrictively.

## 3. JUDGES ⇨22(7)—DIMINUTION OF SALARY PROHIBITED BY CONSTITUTION.

Const. art. 3, § 1, providing that the compensation of judges shall not be diminished during their continuance in office, prohibits anything, the necessary operation and effect of which is to withhold or take from the judge a part of that which has been promised by law for his services.

## 4. JUDGES ⇨22(7)—INCOME OF FEDERAL JUDGE FROM SALARY NOT TAXABLE.

Act Feb. 24, 1919, § 213 (Comp. St. Ann. Supp. 1919, § 6336½ff), so far as it imposes a tax on the income of judges of the courts of the United States, including their salaries, violates Const. art. 3, § 1, providing that the compensation of judges shall not be diminished during their continuance in office, and the fact that the income of other persons is likewise taxed does not validate the tax.

## 5. CONSTITUTIONAL LAW ⇨18—EFFECT MUST BE GIVEN TO BOTH CONSTITUTION AND AMENDMENTS, IF POSSIBLE.

Unless there is some real conflict between Const. art. 3, § 1, providing that the compensation of judges shall not be diminished during their continuance in office, and Amendment 16, relative to the taxation of income, effect must be given to both.

## 6. CONSTITUTIONAL LAW ⇨18—INTENT OF AMENDMENT TO DEPART FROM VITAL CONSTITUTIONAL PRINCIPLE NOT LIGHTLY ASSUMED.

It is not lightly to be assumed that, in adopting the Sixteenth Amendment, there was any purpose to depart from or imperil a constitutional principle so widely extended and so vital to the system of government as the independence of the judiciary.

## 7. INTERNAL REVENUE ⇨2—SALARY OF FEDERAL JUDGES NOT RENDERED TAXABLE BY INCOME TAX AMENDMENT.

Const. Amend. 16, authorizing Congress to collect taxes on incomes, from whatever source derived, without apportionment, among the states, does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment, and hence does not authorize a tax on the salary of a federal judge, contrary to article 3, § 1.

## 8. INTERNAL REVENUE ⇨7—FEDERAL JUDGES SUBJECT TO INCOME TAX ASIDE FROM SALARY.

Apart from his salary, a federal judge is taxable on his income or property the same as any other person.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In Error to the District Court of the United States for the Western District of Kentucky.

Action by Walter Evans against J. Rogers Gore, Acting Collector, etc. Judgment for defendant (262 Fed. 550), and plaintiff brings error. Reversed.

\*246

\*Messrs. William Marshall Bullitt and Edmund F. Trabue, both of Louisville, Ky., for plaintiff in error.

Mr. Assistant Attorney General Frierson, for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States District Judge for the Western District of Kentucky, and holds that office under an appointment by the President made in 1899 with the advice and consent of the Senate. The tax which he calls in question was levied under the act of February 24, 1919, c. 18, 40 Stat. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as District Judge was included in the computation. Had it been excluded he would not have called on to pay any income tax for that year. The inclusion was in obedience to a provision in section 213 (Comp. St. Ann. Supp. 1919, § 6336½ff), requiring the computation to embrace all gains, profits, income and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States [and others] \* \* \* the compensation received as such." Whether he could be subjected

\*247

to such a tax in \*respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the District Court. 262 Fed. 550.

The Constitution establishes three great co-ordinate departments of the national government—the legislative, the executive, and the judicial—and distributes among them the powers confided to that government by the people. Each department is dealt with in a separate article, the legislative in the first, the executive in the second and the judicial in the third. Our present concern is chiefly with the third article. It defines the judicial power, vests it in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish, and declares:

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The plaintiff insists that the provision in section 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation and therefore is repugnant to the constitutional limitation just quoted.

[1] Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general, and also the salary of the President, as to which the Constitution (article 2, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was en-

\*248  
titled by law to invoke our \*decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause—a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this.<sup>1</sup>

<sup>1</sup> See House Report, No. 767, p. 29, 65th Cong., 2d Sess.; Senate Report, No. 617, p. 6, 65th Cong. 3d Sess. And see Cong. Record vol. 56, p. 10370, where the Chairman of the House Committee, in asking the adoption of the provision, said: "I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing \* \* \*

With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminu-

\*249

tion, such \*as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the *Federalist*, No. 78, from which we excerpt the following:

"The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. \* \* \*

federal judges' or the President's salaries, \* \* \* we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested, and it can only be done by some one protesting his tax and taking an appeal to the Supreme Court." And again: "I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."



\*250

This simple view of \*the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshall, whose rich experience as lawyer, legislator, and Chief Justice enabled him to speak as no one else could, tersely said (Debates Va. Conv. 1829-1831, pp. 616, 619):

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? \* \* \* I have always thought, from my earliest youth till now, that

\*251

the \*greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

"It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.

"Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and con-

trolled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and

\*252

establish its power upon lines which all \*can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."

Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington,<sup>2</sup> "the keystone of our political fabric," the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist, No. 79):

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. \* \* \* In the general course of human nature, a power over a man's subsistence amounts to a power over his will. \* \* \* The enlightened friends of good government in every state

<sup>2</sup> Sparks' Washington, vol. 10, pp. 35, 36.

have seen cause to lament the want of precise

\*253

and explicit precautions in \*the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. \* \* \* This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the Constitutions of any of the states in regard to their own judges."

The several commentators on the Constitution have adopted and reiterated this view,<sup>3</sup> Judge Story adding:

"Without this provision [as to an undiminished compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery"

and Chancellor Kent observing:

"It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

[2] These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other

\*254

words, not restrictively, but in \*accord with its spirit and the principle on which it proceeds.

[3, 4] Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him

was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 450, 10 L. Ed. 1022, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that state. The tax was adjusted or proportioned to his compensation, and the state court sustained it. *Erie County Com'rs v. Dobbins*, 7 Watts (Pa.) 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress said:

"Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his compensation

\*255

be prohibited, \*it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 601, 652, 653, 15 Sup. Ct. 673, 39 L. Ed. 759, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597, there was a like holding as to municipal

<sup>3</sup> 2 Story, § 1623; 1 Kent's Com. \*294; 1 Willson's Works, 410, 411; 2 Tucker, § 364; Miller, 340-343; 1 Carson's Supreme Court, 6.



revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognize and gave effect to a prohibition implied from the independence of the states within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax—where its exertion is not directly or impliedly interdicted—it becomes additionally manifest that the prohibition

\*256

now \*under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it "the power to embarrass and destroy"; may be applied to every object within its range "in such measure as Congress may determine"; enables that body "to select one calling and omit another, to tax one class of property and to forbear to tax another"; and may be applied in different ways to different objects so long as there is "geographical uniformity" in the duties, imposts and excises imposed. *McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 443, 19 L. Ed. 95; *Austin v. The Aldermen*, 7 Wall. 694, 699, 19 L. Ed. 224; *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 548, 19 L. Ed. 482; *Knowlton v. Moore*, 178 U. S. 41, 92, 106, 20 Sup. Ct. 747, 44 L. Ed. 969; *Treat v. White*, 181 U. S. 264, 268, 269, 21 Sup. Ct. 611, 45 L. Ed. 853; *McCray v. United States*, 195 U. S. 27, 61, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 158, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *Billings v. United States*, 232 U. S. 261, 282, 34 Sup. Ct. 421, 58 L. Ed. 596; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 24-26, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana, and North Carolina, made under like constitutional restrictions, *Commonwealth ex rel. v. Mann*, 5 Watts & S. (Pa.) 403, 415, et seq.;<sup>4</sup> *New Orleans v. Lea*,

\*257

14 \*La. Ann. 197; 48 N. C. Appendix; N. C. Public Documents 1899, Doc. No. 8, p. 95; *In re Taxation of Salaries of Judges*, 131 N. C. 692, 42 S. E. 970; *Purnell v. Page*, 133 N. C. 125, 45 S. E. 534; and has strong sanction in the actual practice of the government, to which we now advert.

No attempt was made to tax the compensation of federal judges prior to 1862. A statute of that year, chapter 119, § 86, 12 Stat. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of 3 per cent. and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the judiciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701), based on the prohibition we are considering, and in the course of the letter said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent. and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the Legislature.

"The judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that

\*258

used in \*the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void."

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar), and that officer rendered an opinion in substantial accord with Chief Justice Taney's protest, and also advised that the tax on the President's compensation was like-

<sup>4</sup> The tax condemned was levied under a provision, in a general revenue law, charging a tax of 2 per cent. "upon all salaries and emoluments of office,

created or held by or under the Constitution or laws of this commonwealth, and by or under any incorporation, institution or company incorporated by the said commonwealth, where such salaries or emoluments exceed two hundred dollars." Act No. 232, § 2, Penn. Laws 1840, p. 613; Act No. 117, § 9, Penn. Laws 1841, p. 310.

wise invalid. 13 Op. A. G. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded—a part through administrative channels and a part through the action of the Court of Claims and ensuing appropriations by Congress. *Wayne v. United States*, 26 Ct. Cl. 274; chapter 311, 27 Stat. 306. Thus the Secretary of the Treasury, the accounting officers, the Court of Claims and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of 1894, c. 349, § 27 et seq., 28 Stat. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604–606, 15 Sup. Ct. 673, 39 L. Ed. 759. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief:

"There has never been a doubt since the  
\*259  
opinion of Attorney General Hoar \*that the salaries of the President and judges were exempt."

The income tax acts of 1913, 1916, and 1917 (chapter 16, 38 Stat. 168; chapter 463, 39 Stat. 758, § 4 [Comp. St. § 6336d] chapter 63, 40 Stat. 329 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336d]) severally excepted the compensation of the judges then in office—also that of the President for the then current term. In short, during a period of more than 120 years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive and legislative officers. And so it is apparent that in the actual practice of the government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the Sixteenth Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing powers subjects theretofore excepted? The court below answered in the negative; and counsel for the government say:

"It is not, in view of recent decisions, contended that this amendment rendered anything taxable as income that was not so taxable before."

We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

[5, 6] Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the prohibition, in article 3, section 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or im-

peril a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In *Knowlton v. Moore*, supra, 178 U. S. 95, 20 Sup. Ct. 768, 44 L. Ed. 969, this court said:

"The necessities which gave birth to the Constitution, the controversies which preceded its

\*260  
formation, and the \*conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning."

This sound rule is as applicable to the amendments as to the provisions of the original Constitution.

[7] Let us turn then to the circumstances in which this amendment was proposed and ratified and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (article 1, § 2, cl. 3, and section 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; *Id.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and the decision when announced disclosed that the same differences in opinion existing elsewhere were shared by the members of the court, five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the

\*261  
states were essential, the Sixteenth \*Amendment was proposed and ratified. In other words, the purpose of the amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax but only the mode of exercising it. The message of the President<sup>5</sup> rec-

<sup>5</sup> Cong. Rec. vol. 44, p. 3344.



ommending the adoption by Congress of a joint resolution proposing the amendment, the debates<sup>6</sup> on the resolution by which it was proposed, and the public appeals<sup>7</sup>—corresponding to those in the *Federalist*—made to secure its ratification leave no doubt on this point. And that the proponents of the amendment in drafting it lucidly and aptly expressed this as its object is shown by its words:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

True, Gov. Hughes, of New York, in a message laying the amendment before the Legislature of that state for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the amendment such convincing expositions of its purpose,<sup>8</sup> as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income,

whether derived from one \*source or another.<sup>9</sup> And we have so held in other cases.

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 17, 18, 36 Sup. Ct. 236, 241 (60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414), where the purpose and effect of the amendment were first drawn in question, the Chief Justice reviewed at length the legislative and judicial action which prompted its adoption and then, referring to its text and speaking for a unanimous court, said:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the

income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock Case* and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever

\*263  
er source \*the income was derived, shall not be subject to the regulation of apportionment."

What was there said was reaffirmed and applied in *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112, 113, 36 Sup. Ct. 278, 60 L. Ed. 546, and *Peck & Co. v. Lowe*, 247 U. S. 165, 172, 38 Sup. Ct. 432, 62 L. Ed. 1049, and in *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, decided at the present term, we again held, citing the prior cases, that the amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income."

After further consideration, we adhere to that view and accordingly hold that the Sixteenth Amendment does not authorize or support the tax in question.

[8] Apart from his salary, a federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in *Peck & Co. v. Lowe*, 247 U. S. 165, 174-175, 38 Sup. Ct. 432, 62 L. Ed. 1049, and *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748. We think neither case tends to support that view. Each related to a business, one to exportation, the other to interstate commerce, which the taxing power—of Congress in one case, of a state in the other—was restrained from directly burdening; and the

\*264  
holding in both was \*that an income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden

<sup>6</sup> Cong. Rec. vol. 44, pp. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4339-4441.

<sup>7</sup> Cong. Rec. vol. 45 pp. 1694-1699, 2245-2247, 2539, 2540.

<sup>8</sup> Cong. Rec., vol. 45, pp. 1694-1699, 2245-2247, 2539-2540.

<sup>9</sup> In passing the income tax law of 1919 Congress refused to treat interest received from bonds issued by a state or any of its counties or municipalities as within the taxing power, Cong. Rec. vol. 57, pp. 553, 774-777, 2988; chapter 18, § 213, 40 Stat. 1065; and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a state and its political subdivisions are not taxable by the United States. Reg. 45, published 1920, pp. 47, 313.

the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition, and so must be adjudged invalid.

Judgment reversed.

Mr. Justice HOLMES dissenting.

This is an action brought by the plaintiff in error against an acting Collector of Internal Revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income six thousand dollars, being the amount of his salary as a judge of the District Court of the United States. The Act of February 24, 1919, c. 18, § 210, 40 Stat. 1057, 1062 (Comp. St. Ann. Supp. 1919, § 6336½e), taxes the net income of every individual, and section 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to be computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are

\*265

\*contrary to article 3, section 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the validity of the above-mentioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that if not so, it was made lawful by the Sixteenth Amendment. In the first place I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the *Federalist* (No. 79) that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary du-

ties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops, or to put it in the language of the clause, a point at which it could not be said that his

\*266

compensation was diminished by a charge. If he bought a house the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So if he bought bonds. Yet in such cases the advantages of his salary would be diminished. Even if the house or bonds were bought with other money the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no reason why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this Court seem to me to justify my conclusion. In *Peck & Co. v. Lowe*, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049, a tax was levied by Congress upon the income of the plaintiff corporation. More than two-thirds of the income were derived from exports and the Constitution in terms prohibits any tax on articles exported from any state. By construction it had been held to create "a freedom from any tax which directly burdens the exportation." *Fairbanks v. United States*, 181 U. S. 283, 293, 21 Sup. Ct. 648, 652 (45 L. Ed. 862). The prohibition was unequivocal and express, not merely an inference as in the present case. Yet it was held unanimously that the tax was valid. "It is not laid on in-



come from exportation \* \* \* in a discriminative way, but just as it is laid on other income. \* \* \* <sup>\*267</sup> There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied \* \* \* after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.” 247 U. S. 174, 175, 38 Sup. Ct. 434, 62 L. Ed. 1049. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748, the same principle was affirmed as to interstate commerce and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government from which parties were not exempted because they happened to be engaged in commerce among the States.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the scope of the original document, the Sixteenth Amendment justifies the tax, whatever would have been the law before it was applied. By that amendment Congress is given power to “collect taxes on incomes from whatever source derived.” It is true that it goes on “without apportionment among the several States, and without regard to any census or enumeration,” and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

Mr. Justice BRANDEIS concurs in this opinion.

(253 U. S. 325)

CREAM OF WHEAT CO. v. GRAND FORKS COUNTY, N. D.

(Argued April 29, 1920. Decided June 1, 1920.)

No. 302.

1. CONSTITUTIONAL LAW §283—TAXATION §37—STATUTE IMPOSING TAX ON VALUE OF STOCK, THOUGH CORPORATION HAS NO PROPERTY WITHIN STATE, IS VALID.

Comp. Laws N. D. 1913, §§ 2077, 2102, 2103, 2110, which as construed by the state Supreme Court, imposes a tax on the value of the outstanding stock of domestic corporations in excess of the value of the real and personal prop-

erty and certain indebtedness, though the corporation has neither tangible property nor papers evidencing the ownership of intangible property within the state, does not violate rights guaranteed by the Fourteenth Amendment, whether the tax is regarded as a property tax or a franchise tax.

2. CORPORATIONS §52—DOMICILED IN STATE OF INCORPORATION.

A corporation is domiciled in the state under whose laws it is incorporated.

3. TAXATION §112(1)—DOMESTIC CORPORATIONS SUBJECT, NOTWITHSTANDING LOCATION OF PROPERTY AND BUSINESS.

That the property and business of a corporation are entirely in another state does not make it any the less subject to taxation in the state of its domicile.

4. CONSTITUTIONAL LAW §283—RESIDENT MAY BE TAXED FOR PROPERTY OUTSIDE STATE, UNLESS IT HAS PERMANENT SITUS THERE.

The limitation imposed by the Fourteenth Amendment on the taxing powers of the state is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries, and the limitation does not apply, even to tangible personal property without the state of a corporation's domicile, if it has no permanent situs anywhere.

5. CONSTITUTIONAL LAW §283—RESIDENT MAY BE TAXED FOR INTANGIBLE PROPERTY, THOUGH TAXABLE ELSEWHERE.

The rule that, under the Fourteenth Amendment, a state may not tax a resident for property having a permanent situs beyond its boundaries, has no application to intangible property, even though the property is also taxable in another state by virtue of having acquired a business situs there.

6. CONSTITUTIONAL LAW §283—TAXATION §47(1)—DOUBLE TAXATION NOT PROHIBITED BY FOURTEENTH AMENDMENT.

Const. Amend. 14, does not prohibit double taxation.

In Error to the Supreme Court of the State of North Dakota.

Action by the County of Grand Forks, N. D., against the Cream of Wheat Company. A judgment for defendant was reversed by the Supreme Court of North Dakota, and judgment entered for plaintiff (*Grand Forks County v. Cream of Wheat Co.*, 170 N. W. 863), and defendant brings error. Affirmed.

\*326

\*Messrs. Rome G. Brown and Harry S. Carson, both of Minneapolis, Minn., for plaintiff in error.

Messrs. Albert E. Sheets, Jr., and George E. Wallace, both of Bismarck, N. D., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] By the statutes of North Dakota, as construed by the Supreme Court of the state,

a manufacturing corporation organized under its laws is taxed in the following manner: Its real and personal property within the state is assessed like that of an individual. In addition there is assessed against it an amount equal to the aggregate market value of its outstanding stock, less the value of its real and personal property and certain indebtedness. The corporation, in submitting its list of property for purposes of taxation, is required to enter this additional amount as "bonds and stocks," under item 23 in the prescribed statutory schedule. On this additional amount, as upon the value of its real and personal property, the corporation is taxed at the same rate and in the same manner as individuals are upon their property. The statute does not in terms impose a franchise tax as distinguished, or separated, from a tax on personal property, but the

\*327

Supreme Court of the state construes the tax upon this additional amount as a tax, "in substance or effect, to some degree at least, upon the privilege of being a corporation," or, in other words, a tax upon the corporate franchise granted it by the state. Individuals are not required to include in their lists of taxable property any share or portion of the capital stock or property of any corporation which such corporation is required to list. Compiled Laws of North Dakota for 1913, §§ 2110, 2103, 2102, 2077; County of Grand Forks v. Cream of Wheat Co. (N. D.) 170 N. W. 863.

The Cream of Wheat Company was incorporated under the laws of North Dakota after the enactment of the tax legislation above described, and it maintained throughout the years 1908 to 1914, both inclusive, a public office in the city of Grand Forks in said state for the transaction of its usual and corporate business. Its manufacturing, commercial, and financial business was conducted wholly without the state, and it had not at any time during any of those years within the state either any tangible property real or personal or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. In 1914 the officials of North Dakota assessed against the company in the manner prescribed by law for each year from 1908 to 1913, both inclusive, a tax at the uniform rate on the sum of \$50,000, as representing personal property, to wit, "bonds and stocks" which had escaped taxation. They also assessed a similar tax for the then current year. The taxes not being paid, this action was brought in a state court for the amount; and the facts above stated were proved. The trial court entered judgment for the defendant; but its judgment was reversed by the Supreme Court of the state, which entered judgment for the county for the full amount of

the taxes. The case is here on writ of error under section 237 of the Judicial Code (Comp. St. § 1214).

\*328

\*The company concedes that the state of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws, even though it had no property within the state. The contentions are that the Supreme Court of North Dakota erred in holding that the tax here in question was a franchise tax, that it was in reality a property tax upon intangible property, that the company's intangible property must be deemed to have been located where its tangible property was, and that in taxing property beyond its limits North Dakota violated rights guaranteed by the Fourteenth Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare *Hamilton Company v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Commonwealth v. Hamilton Manufacturing Co.*, 12 Allen (Mass.) 298. The view also renders it unnecessary to consider whether the company having been incorporated in North Dakota after the enactment of the law in question is in a position to complain. Compare *Interstate Railway Co. v. Massachusetts*, 207 U. S. 79, 84, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; *International & Great Northern Railway Co. v. Anderson County*, 246 U. S. 424, 433, 38 Sup. Ct. 370, 62 L. Ed. 807; *Home Insurance Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1035; *Corry v. Mayor and Council of Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556.

[2-5] The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in *Louisville & Jeffersonville Ferry Co. v. Kentucky*,

\*329

\*188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513 (an incorporeal hereditament partaking of the nature of real property)<sup>1</sup> and the tangible

<sup>1</sup> See *Hawley v. Malden*, 232 U. S. 1, 12, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C, 842; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1740; *Lewis v. Gainesville*, 7 Ala. 85; *Dundy v. Chambers*, 23 Ill. 369; *Reg. v. Cambrian Railway Co.*, Law Rep. 6 Q. B. 422. Compare *Thompson v. Schenectady Ry. Co.* (C. C.) 124 Fed. 274. The "franchise" referred to in



personal property permanently outside the state involved in *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077, and *Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493, were held immune from taxation by the states in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68, 32 Sup. Ct. 13, 56 L. Ed. 96. Nor has it any application to intangible property (*Union Transit Co. v. Kentucky*, supra, 199 U. S. 205, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Hawley v. Malden*, 232 U. S. 1, 11, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C, 842), even though the property is also taxable in another state by virtue of having acquired a "business situs" there (*Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59, 38 Sup. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124). As stated in that case:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 146, 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, et seq. Whichever this tax technically may be, the authorities show that it must be sustained."

[6] Counsel for the company direct our attention to cases like *Adams Express Co. v. Ohio*, 165 U. S. 194, 227, 17 Sup. Ct. 305, 41 L. Ed. 683, and 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, which hold that a state may tax a foreign corporation, not only on the value of its tangible property within the state, but also on that proportion

of its entire <sup>\*330</sup>intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once and that it may be subjected to double taxation. To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. *Coe v. Errol*, 116 U. S. 517, 524, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kidd v. Alabama*, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669; *Fidelity & Columbia Trust Co. v. Louisville*, supra.

Affirmed.

*Home Insurance Co. v. New York*, 134 U. S. 594, 601, 10 Sup. Ct. 593, 33 L. Ed. 1035, as personal property consisted in the right to do business as a corporation (see page 599).

(253 U. S. 412)

**F. S. ROYSTER GUANO CO. v. COMMONWEALTH OF VIRGINIA.**

(Argued March 19 and 22, 1920. Decided June 7, 1920.)

No. 165.

1. CONSTITUTIONAL LAW ⇨229(1)—TAXATION ⇨37—IMPOSITION OF TAX ON INCOME FROM SOURCES OUTSIDE THE STATE INVALID, WHERE CORPORATIONS DOING NO BUSINESS WITHIN STATE ARE NOT TAXED.

Acts Va. 1916, c. 472, in so far as it imposes on a domestic corporation doing business both within and outside the state a tax with respect to its income derived from sources outside the state, denies such corporation the equal protection of the laws, in violation of the Fourteenth Amendment, in view of Acts Va. 1916, c. 495, exempting domestic corporations doing no part of their business within the state from any tax on their income; the classification being arbitrary.

2. TAXATION ⇨113—TAXING STATUTES TO BE CONSTRUED TOGETHER.

Acts Va. 1916, c. 472, imposing an income tax on persons or corporations, and including all income or profits from business done in or out of the state, and Acts Va. 1916, c. 495, exempting domestic corporations doing no business within the state from taxation on their income, must be construed together as parts of one and the same law.

3. CONSTITUTIONAL LAW ⇨209—STATES MAY RESORT TO CLASSIFICATION IN LEGISLATION.

The equal protection of the laws, required by Const. Amend. 14, does not prevent the states from resorting to classification for the purposes of legislation.

4. CONSTITUTIONAL LAW ⇨209—CLASSIFICATION MUST REST UPON SOME REASONABLE GROUNDS OF DIFFERENCE.

Under Const. Amend. 14, classification for purposes of legislation must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

5. CONSTITUTIONAL LAW ⇨229(1)—ILLUSORY CLASSIFICATION FOR PURPOSES OF TAXATION CANNOT BE SUSTAINED.

While the latitude of discretion is wide in the classification of property for purposes of taxation, a discriminatory tax cannot be sustained against the complaint of a party aggrieved, if the classification is altogether illusory.

Mr. Justice Brandeis and Mr. Justice Holmes dissenting.

In Error to the Supreme Court of Appeals of Virginia.

Proceeding by the F. S. Royster Guano Company against the Commonwealth of Virginia. A judgment for defendant was in effect affirmed by the Supreme Court of Appeals of Virginia, and the petitioner brings error. Reversed and remanded.

Messrs. Cadwallader J. Collins and James E. Heath, both of Norfolk, Va., for plaintiff in error.

Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia.

Mr. Justice PITNEY delivered the opinion of the Court.

Plaintiff in error is a corporation created by and existing under the laws of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. It operates a manufacturing plant in the county of Norfolk in that state and several plants in other states. From the operation of its plant in Virginia it made net profits during the year ending December 31, 1916, amounting in round figures to \$260,000, and from the operation of its plants in other states during the same year made net profits amounting to about \$270,000. Under the revenue law of

\*413

the state (Act April 16, 1903 [Va. Acts, c. 148, p. 155], as amended by Act March 22, 1916 [Va. Acts, c. 472, p. 793]), plaintiff in error returned for taxation as income the former amount, omitting the latter. Under appropriate provisions of law the state officials added the latter amount, and assessed an income tax against plaintiff in error upon the aggregate. It petitioned the corporation court of the city of Norfolk for relief from so much of the tax as represented the \$270,000, among other reasons upon the ground that, so far as chapter 472 of 1916 taxed that part of its business which was transacted outside of the limits of Virginia, the law imposed upon plaintiff in error a burden not placed upon domestic corporations doing no part of their business in Virginia but transacting business beyond the limits thereof, such corporations, by chapter 495 of 1916 (Va. Acts, p. 830), being expressly exempted from a tax on income derived from business done without the limits of the state; and hence chapter 472, as applied to the business of plaintiff in error transacted beyond the limits of the state, denied to it the equal protection of the laws, in violation of the Fourteenth Amendment. Other points were raised, but they require no mention. The corporation court having sustained the tax, plaintiff in error applied to the Supreme Court of Appeals of the state for a writ of error and supersedeas to review the judgment. That court being of opinion that the decision was right, the application was denied and an order entered in effect affirming the judgment of the corporation court; whereupon this writ of error, directed to the Supreme Court of Appeals in accordance with the practice indicated in *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264, 269, 32 Sup. Ct. 828, 56 L. Ed. 1082, was sued out under section 237, Judicial Code, as amended September 6, 1916 (39 Stat. 726, c. 448 [Comp. St. § 1214]).

[1] The statute thus assailed (Va. Acts 1916, c. 472) imposes an income tax of 1 per centum upon "the aggregate amount of income of each person or corporation," sub-

\*414

ject \*to specified deductions and exemptions; including in income "all profits from earnings of any partnership or business done in or out of Virginia," and also "all other gains and profits derived from any source whatever." Under this act, as applied to plaintiff in error by the state officers, whose action was sustained by the court of last resort, a tax was imposed upon the income derived from its plants without the state as well as from that within the state. At the same time, chapter 495, Acts 1916 (page 830), approved on the same day, was in force. This reads as follows:

"Whereas, certain corporations have been organized under the laws of Virginia, and it is anticipated that certain others will be organized thereunder, which do no business within this state; therefore—1. Be it enacted by the general assembly of Virginia, that no income tax nor ad valorem taxes, state or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under the laws of this state which do no part of their business within this state; and the mere holding of stockholders' meetings in this state by such corporations required by law, shall not be construed as doing any business in this state within the meaning of this act"—with further matter not necessary to be quoted.

It is not disputed that, under this act, corporations created by and existing under the laws of Virginia, and doing business in other states, but none within the state except the holding of stockholders' meetings, are exempted from the payment of any income tax.

[2] Of course, these two statutes—chapter 472 and chapter 495—must be considered together as parts of one and the same law; and by their combined effect, if the judgment under review be affirmed, plaintiff in error will be required to pay a tax upon its income derived from business done without as well as from that done within the state, while other corporations owing existence to

\*415

the same laws and simul\*aneously deriving income from business done without the state, but none from business within it, are exempt from taxation.

[3-5] It unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the



legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892; *Michigan Central Railroad v. Powers*, 201 U. S. 245, 293, 26 Sup. Ct. 459, 50 L. Ed. 744; *Keeney v. New York*, 222 U. S. 525, 536, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139; *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 329, 33 Sup. Ct. 833, 57 L. Ed. 1206; *Northwestern Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 139, 38 Sup. Ct. 444, 62 L. Ed. 1205. Nevertheless a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of chapter 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the state except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the state warranting the imposition of taxes upon their incomes derived from without the state or property taxes upon their intangibles, and in recognition of the impolicy, if not injustice, of imposing such taxes upon them while they are liable,

\*416

and presumably subjected, to taxation in the state or states where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the state where they also transact income-producing business within the state. Corporations of this class derive no more protection from the state of their origin with respect to their outside business, and are no less subject to taxation by the states in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the state of origin. Their business done within the state presumably is of some general benefit to the state, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under chapter 472 of taxes not only upon this income, but also upon income that they derive from business conducted outside of the state (similar income of the favored corporations being exempted) has the effect of discriminating

against them for that which ought to operate if at all in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design.

We suggest that it was inadvertent because shortly after the present suit was brought, and as if in recognition of and in order to correct the discrimination, the revenue act was amended by Act of March 14, 1918 (chapter 219, Va. Acts, p. 395), providing:

\*417

"Persons and corporations \*doing a part of their business within the state and a part without the state, and having offices or other regular places of business both within and without the state, shall be taxed only upon such income as is derived from business transacted and property located within the state, which may be determined by an allocation and separate accounting," etc.

But this was not retrospective, and, for the reasons given, we are constrained to hold that so far as chapter 472 of the Laws of 1916 operated to impose upon plaintiff in error a tax upon income derived from business transacted and property located without the state because of the mere circumstance that it also derived income from business transacted and property located within the state, while at the same time, under chapter 495, other corporations deriving their existence and powers from the laws of the same state, and receiving income from business transacted and property located without the state, but none from sources within the state, were exempted from income taxes, there was an arbitrary discrimination amounting to a denial to plaintiff in error of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BRANDEIS dissenting, with whom Mr. Justice HOLMES concurs.

It is settled that mere inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment; that the power of the state to make any reasonable classification of property, occupations, persons or corporations for purposes of taxation is not abridged thereby; and that the amendment forbids merely inequality which is the result of clearly arbitrary action and, particularly, of

\*418

action \*attributable to hostile discrimination against particular persons or classes. *Beers v. Glynn*, 211 U. S. 477, 485, 29 Sup. Ct. 186,

53 L. Ed. 290; *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, 463, 464, 17 Sup. Ct. 829, 42 L. Ed. 236; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892. The question presented for our decision is whether the action of Virginia in subjecting its domestic corporations which transact business within the state to a tax on all their income, wherever earned, while exempting from the tax those domestic corporations which transact no business within the state, is so clearly arbitrary or invidious, as to fall within the constitutional prohibition.

The court declares the act void on the ground that no substantial reason for difference in treatment between the two classes of domestic corporations has been suggested or can be conceived; and that the classification is illusory and the state's action arbitrary. I can conceive of a reason for differentiating in respect to taxation between the two classes of domestic corporations. The following reason is, in my opinion, substantial, and shows that the classification is not illusory, nor the state's action necessarily arbitrary or invidious.

It is a matter of common knowledge that some states have, in the past, made the granting of charters to nonresidents for companies, which purpose transacting business wholly without the state of incorporation, an important source of revenue. The action of those states has materially affected the legislation of other states. Sometimes it has led to active competition for the large revenues believed to be available from this source. More often, it has led to protective measures. The Legislature of Virginia may have believed that its own citizens interested in corporations whose business was transacted wholly in other states or countries, might be tempted to incorporate under more favorable laws of other states, but that such temptation would prove ineffective where the companies transacted a part of their busi-

\*419

ness within \*the state of Virginia and enjoyed compensating advantages. If the Legislature of Virginia enacted the laws of 1916 here in question because it held that view, we surely cannot say that its action was unreasonable or arbitrary. And with the wisdom of its action we have no concern.

If there were a doubt as to its reasonableness the facts which were, or may have been, before the Legislature should be considered. Every private domestic business corporation makes a substantial contribution to the revenues of Virginia, even if it is not subjected to property or income taxes. It pays an organization tax on incorporation, and annually thereafter both a registration fee and an annual franchise tax. These fees and taxes are graduated. For a corporation with a \$1,000,000 capital the organization fee is \$200; the annual registration fee and

franchise tax \$225. Acts of 1903, c. 148, §§ 37, 43, 41, pp. 179, 182, 180, as amended respectively by Acts of 1912, c. 301; Acts 1910, c. 58; Acts 1908, c. 227. In the year 1915-1916 the fees and taxes from this source aggregated \$114,175.80.<sup>1</sup> The number of charters issued was 1067—many of them, as the list indicates, to companies whose business would be transacted wholly without the state of Virginia.<sup>2</sup> The dangers from competition incident to less burdensome corporation laws of other states had, in other connections, been considered by the tax commission.<sup>3</sup> It may well have been the case that the Legislature did not wish to put in peril revenues already being received from concerns which, as they transacted no business within the state, might easily have surrendered their Virginia charters and reincorporated under the laws of the other states;

\*420

and it would have been natural that \*to avert such loss the Legislature should have relieved such corporations from the payment of income taxes. The joint committee on tax revision had recommended that the income tax cover "all profits from earnings of any partnership or business done in or out of Virginia," and had not suggested that domestic corporations should be exempted from it.<sup>4</sup> It was reasonable that other domestic corporations should have been subjected, like natural persons domiciled within the state, to a tax on all income—whether earned within or without the state. Compare *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325, 40 Sup. Ct. 558, 64 L. Ed. —, decided June 1, 1920.

The court calls attention to the Act of March 14, 1918 (chapter 219, Va. Acts, p. 395), which exempts all individuals and corporations from the burden of taxation on incomes earned without the state. The effect of this act is, among other things, to remove the alleged discrimination here complained of. But its enactment does not, in my opinion, indicate that the imposition of the tax was inadvertent. To my mind it indicates rather that the Legislatures of the several states may safely be intrusted with the duty of legislation.

I cannot doubt that the classification for purposes of taxation made by the act of 1916 was within the power of the state. But if I did not think the matter clear, I should, for the reasons stated by me fully elsewhere, feel constrained to resolve the doubt in favor of the constitutionality of the act.

<sup>1</sup> Report of Auditor of Virginia (1916) p. 66; Report of State Corporation Commission of Virginia (1916) p. 270.

<sup>2</sup> Report of State Corporation Commission of Virginia (1916) pp. 226-248, 269.

<sup>3</sup> Report of Virginia Tax Commission (1911) p. 354.

<sup>4</sup> Report of Joint Committee on Tax Revision (Virginia, 1914) p. 203.



(253 U. S. 447)

## BEIDLER v. UNITED STATES.

(Argued April 27 and 28, 1920. Decided June 7, 1920.)

No. 260.

1. PATENTS  118—OPERATION OF PHOTOGRAPHING AND DEVELOPING APPARATUS HELD NOT SUFFICIENTLY DESCRIBED.

Under Rev. St. § 4888 (Comp. St. § 9432), requiring disclosure of the best mode of an application of the discovery, specifications of patent for photographing and developing apparatus *held* not to include in the description of the operation the giving of an oscillating movement to the film to cause its prompt submergence in the developer, without which the operation would be unsuccessful.

2. PATENTS  328 — 1,057,397 FOR PHOTOGRAPHING AND DEVELOPING APPARATUS HELD VOID FOR INSUFFICIENT DISCLOSURE.

Beidler patent, No. 1,057,397, for photographing and developing apparatus, *held* void for insufficient disclosure of mode of operation.

3. PATENTS  328—1,057,397 HELD NOT INFRINGED BY PHOTO-COPYING MACHINE MANUFACTURED UNDER No. 1,001,019.

Photo-copying machine known as Photostat, manufactured and sold under Green patent, No. 1,001,019, *held* not an infringement of Beidler patent, No. 1,057,397, if the latter were valid.

Appeal from the Court of Claims.

Suit by George C. Beidler against the United States to recover damages for infringement of a patent. Decree for defendant (53 Ct. Cl. 636), and complainant appeals. Affirmed.

See, also, 40 Sup. Ct. 9, 64 L. Ed. —.

Messrs. Charles J. Williamson and Frank S. Appleman, both of Washington, D. C., for appellant.

The Attorney General, Mr. Frank Davis, Jr., Asst. Atty. Gen., and Messrs. Daniel L. Morris, and Edward G. Curtis, Sp. Asst. Attys. Gen., for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit to recover damages for the infringement of 5 of the 41 claims of letters patent No. 1,057,397, applied for March 23, 1907, and granted on March 25, 1913.

The specification describes the claimed invention as an improvement in photographing and developing apparatus, and as designed primarily for reproducing writings, drawings, pictures or the like, "novel means being also provided to convey the sensitized film through a series of receptacles containing suitable developing and fixing fluids or though suitable baths, according to requirements."

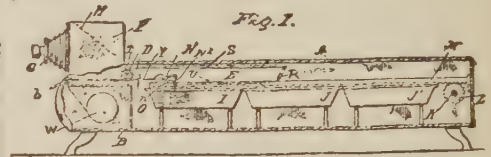
\*448

\*The patent is for a machine made up of a combination of elements all of which were old, to produce a result which was old but by a method of co-ordination and operation

which it is claimed is new and useful. The invention is declared in the specification to consist in "the details of construction and in the arrangement and combination of the parts," as "set forth and claimed" by the inventor.

Figure 1 of the drawings, forming a part of the specification, will aid in explaining the construction and function of the invention as claimed and in determining the character and extent of the disclosures of the patent.

\*449



\*448

\*The described mode of operation is substantially as follows:

W is a roll of sensitized paper or film placed immediately below the exposure chamber *F* of a camera, with its sensitized surface uppermost to receive the desired image, reflected from the mirror *H*. This film is fed into the chamber between the rolls *b*, and thence along the floor to the rollers *D* where it emerges from the camera and is seized by "clips" or clamps *N*. These clamps are supported and carried by a rack *M*, and may be moved to and fro (reciprocated) by turning the pinions *L* on the shaft *K*, by means of a crank.

*I*, *J* and *J'* are shallow pans or "tanks" in which suitable "developing," "fixing," and "washing" solutions or fluids are placed and the whole of the construction to the right of the camera, as we face the print, is inclosed in a light-proof case *B*, referred to in the patent sometimes as a "compartment" and sometimes as a "chamber." The rack *M*, and the clamps which hold and support the film, move above the tanks and necessarily above the level of the liquid within them. By turning the pinion *L*, the rack *M* is moved outwardly away from the camera, and the clamps draw the film after them until the required length is attained, when it is severed from the roll by a manually operated cutter,

\*450

O. When the film is thus cut to the \*desired length, obviously only the free end will fall to the surface of the solution in the tank *I*, and by continuing the outward movement of the rack *M*, the specification declares, "the film is carried through the several tanks." The "clips" or clamps are set and released automatically and at the limit of the outward movement the film is released and falls into the tank *J'*. By reversing the turning of the pinions *L* the rack and clamps are returned inwardly to the camera, so that the operation, just detailed, may be repeated.

The Court of Claims carries into its findings of fact fourteen patents as illustrative of the prior art, and with this exhibit before us we fully agree with that court that the claim of invention of appellant must be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film "through the developing and other solutions or liquids" after it leaves the camera.

In the description of the operation of the machine as we have just given it, there is no provision other than gravity for causing the free end of the film, when it is cut from the roll, to sink into the developing fluid, and the other end of it is held between the clamps, above the surface of the fluid, as it is drawn along from one tank to another. The Court of Claims found that under such conditions of operation all of the film would not be submerged with sufficient rapidity and uniformity to secure a proper and useful development of the image and this conclusion is not seriously disputed. But the appellant contends that the required submergence may be obtained by oscillating the rack and clamps (and thereby the film) back and forth within the range of a few inches when the film is over the first tank *I*, with the result that the free end of the film, first sinking into the fluid, is turned under and over and the exposed side of it wholly submerged and thereby developed.

\*451

\*In reply to this it is contended by the Government that the disclosures of the patent do not contain any suggestion of a short, reciprocating movement of the rack, such as is thus relied upon, and that the drawings provide for a construction of the machine which would be inoperative if such movement were resorted to.

Upon this subject the finding of the Court of Claims is, that the machine can be rendered operative only "by resorting to a new oscillating mode of operation evolved by the claimant for submerging and developing the film," and that such mode of operation is not disclosed in the patent. On the contrary, it is especially found that:

"By the method contemplated and disclosed in the patent, the film with the exposed side up, held at one end by the clamps attached to the rack *M* and moving in a plane above the pans containing the developing and fixing fluids, is intended, by the outward movement of the rack, to be drawn successively through the developing and fixing fluids, the rack moving in one direction only through its entire course, the end of the film next the knife and away from the clamps falling, when severed by the knife, on the surface of the developer in the first pan and submerging by gravity."

[1, 2] Treating this finding by the court as an interpretation of the patent and therefore as a conclusion of law and subject to review, we are brought to the question whether the short, reciprocating movement of the rack,

confessedly necessary to successful operation of the machine, is disclosed in the patent, as it must be to render it valid. R. S. § 4888 (Comp. St. § 9432).

The only description of the mode of operation of appellant's machine, and the statute requires that this must be the best mode known to the patentee (R. S. § 4888), is found in the specification and is as follows:

"In order to draw the film through the several compartments, I provide a mechanism con-

\*452  
sisting of a shaft *K*, \*having toothed wheels *L*, which mesh with a rack *M*, the said rack being suitably guided in the compartment *E*, and being alternately reciprocated through the rotation of the shaft *K*, in opposite directions. When the shaft is turned to the right, the said rack will be projected from the compartment until the inner end thereof is nearly above the shaft *K*. When the shaft is rotated in the opposite direction, the said rack will, of course, be retracted and thrust into the compartment. It is the purpose of this invention that the said rack shall carry clips *N*, which are designed to clamp on the edges of the film *Y* and as the said rack is moved outwardly, the film is carried through the several tanks as indicated. The clips are automatically released and set through the contact with trips within the casing in the path of travel of said clips."

We agree with the Court of Claims that this language describes a movement of the rack *M*, carrying the clamps *N*, in one direction only—outwardly and progressively away from the camera—until the movement is completed and the film is released, and that the reciprocating movement referred to in the patent is the return of the mechanism for clamping and carrying the film to its initial position for the purpose of repeating the operation.

There is nothing in the disclosure or in the claims to suggest the arresting of the outward movement of the clamps as soon as the film is severed from the roll and the initiating thereupon of a short oscillating movement of the mechanism to and fro, until the film shall have been immersed in the developing liquid sufficiently to bring out the image photographed. It is very clear that no such operation can be derived from the disclosure in the patent, and we agree with the further finding of the Court of Claims that in order to permit "this new oscillating mode of operation evolved by the claimant" material changes would be required in the construction of the machine, from that disclosed in the description and drawings.

\*453

\*The statutes, which are the source of all patent rights, provide that a valid patent may be granted for a new and useful machine, or for a new and useful improvement thereof (R. S. § 4886 [Comp. St. § 9430]), but they require that every applicant for a patent shall file a written description of the manner and process of making and using his invention "in such full, clear, concise and



exact" terms as to enable any person skilled in the art to which it relates to make and construct it, and in case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery. R. S. § 4888.

Ever since *Grant et al. v. Raymond*, 6 Pet. 218, 247, 8 L. Ed. 376, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful, must result in the approval of the judgment of the Court of Claims, that the patent is invalid and void, for the reason that it fails to disclose a practical and useful invention.

[3] This result renders it unnecessary to consider the further conclusion of the court

\*454

below that the use by the \*United States of photo-copying machines of a type known as "Photostat," manufactured and sold under warrant of letters patent issued to D. S. Green No. 1,001,019, would not have constituted an infringement of appellant's patent had it proved to be valid. However, for its bearing on future possible controversy we add that the construction and relation of the two appliances, designed to produce the same result or product, have been fully considered and that we agree with the conclusion of the Court of Claims.

Affirmed.

(253 U. S. 454)

KWOCK JAN FAT v. WHITE, Commissioner of Immigration.

(Argued and Submitted April 30, 1920. Decided June 7, 1920.)

No. 313.

1. HABEAS CORPUS — 55, 77 — RECORDS IN CHINESE EXCLUSION PROCEEDINGS ATTACHED TO HABEAS CORPUS PETITION AND WITH RETURN SHOULD BE CONSIDERED IN INTERPRETING THE PETITION.

Where petition for habeas corpus for discharge in proceedings under Chinese Exclusion

Acts had attached thereto all proceedings prior to the appeal to Secretary of Labor, and prayed that proceedings thereafter be made a part of petition when they became available, the courts should give effect in interpreting the petition to the immigration records filed with the petition and with the respondent's return.

2. ALIENS — 32(9) — DECISION EXCLUDING CHINESE MUST BE BASED ON FAIR HEARING.

While the decision by the Secretary of Labor on the exclusion of a Chinese person is final unless the proceedings were manifestly unfair or show manifest abuse of discretion, the decision must be made after a hearing in good faith, however summary, and must find adequate support in the evidence.

3. ALIENS — 32(9) — OMISSION FROM RECORD OF STATEMENT THAT WHITE WITNESS PERSONALLY IDENTIFIED PETITIONER AS NATIVE CITIZEN HELD FATAL.

Where three white citizens had testified that petitioner was a native Chinese upon investigation to determine his status before he visited China, but identified him only from his photograph, and on his return he was excluded as not being the person he claimed to have been in the preliminary investigation, the omission from the record sent to the commissioner of immigration and, on appeal, to Secretary of Labor, of statement that on the later investigation the three white witnesses were confronted with petitioner, and there was mutual recognition, rendered the report unfair, so that the Secretary's order for exclusion was not final.

4. ALIENS — 32(9) — POWER OF SECRETARY OVER CHINESE MUST BE OPENLY ADMINISTERED.

The great power given Secretary of Labor by the Acts of Congress over Chinese immigrants and persons of Chinese descent must be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved.

On writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Petition for habeas corpus by Kwock Jan Fat against Edward White, as Commissioner of Immigration at the Port of San Francisco. Judgment of the District Court, sustaining demurrer to the petition, was affirmed by the Circuit Court of Appeals (255 Fed. 323, 166 C. C. A. 493), and petitioner brings certiorari. Reversed, and cause remanded to the District Court for trial on the merits.

See, also, 249 U. S. 596, 39 Sup. Ct. 291, 63 L. Ed. 794.

\*455

\*Mr. Jackson H. Ralston, of Washington, D. C., for petitioner.

Mr. Assistant Attorney General Stewart and Mr. Harry S. Ridgely, of Washington, D. C., for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

In January, 1915, Kwock Jan Fat, the petitioner, intending to leave the United States on a temporary visit to China, filed with the Commissioner of Immigration for the Port of San Francisco an application, as provided for by law, for a "preinvestigation of his claimed status as an American citizen by birth."

He claimed that he was 18 years of age, was born at Monterey, Cal., was the son of Kwock Tuck Lee, then deceased, who was born in America of Chinese parents and had resided at Monterey for many years; that his mother at the time was living at Monterey; and that there were five children in the family—three girls and two boys.

The Department of Immigration made an elaborate investigation of the case presented by this application, taking the testimony of the petitioner, of his mother, of his brother and one sister and of three white men, of whom the inspector said in his report:

"The three white witnesses are representative men of this town and would have no motive in misstating the facts."

As a result of this inquiry, the original of his application, approved, signed and sealed by the Commissioner of Immigration at San Francisco, was delivered to the petitioner,

and \*with this evidence in his possession, which he was amply justified in believing would secure his readmission into the United States when he returned, he went to China.

The record shows that during his absence anonymous information reached the San Francisco Immigration Office (in which there had been a change of officials) to the effect that petitioner's name was not Kwock Jan Fat, as claimed, but was Leu Suey Chong and that he had entered the United States in 1909 as the minor son of a merchant, Lew Wing Tong, of Oakland, Cal. Thereupon an investigation was conducted, chiefly by the comparison of photographs, for the purpose of determining the truthfulness of this anonymous suggestion, with the result that when the petitioner returned to San Francisco he was not allowed to land, and a few days thereafter was definitely denied entry to the country by the Commissioner of Immigration. Hereafter, this decision of the Commissioner was reconsidered, the case reopened and testimony for and against the petitioner was taken, but the Commissioner adhered to his denial of admission. The only reason given for the decision was "the claimed American citizenship is not established to my satisfaction."

Thereupon an appeal was taken to the Secretary of Labor, who approved the order appealed from.

Promptly thereafter the petition for a writ of habeas corpus in this case was filed, which is based chiefly upon two claims, viz.:

(1) That the examining inspector reported to the Commissioner of Immigration as evidence, statements purporting to have been obtained from witnesses under promise that their names would not be disclosed, and that when demand was made for the names of such witnesses for purpose of reply, it was refused, with the result that petitioner did not have a fair hearing.

(2) That the examining inspector did not record an \*important part of the testimony of three white witnesses called by petitioner, with the result that it was not before the Commissioner of Immigration or the Secretary of Labor when they decided adversely to him, and thereby he was arbitrarily denied a fair hearing.

A general demurrer to this petition was sustained by the District Court and on appeal to the Circuit Court of Appeals that judgment was affirmed. The case is here on writ of certiorari.

[1] With the petition were filed all of the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and since it is prayed that when the copy of the proceedings thereafter had shall become available they may be made a part of the petition, it was proper for the courts below and is proper for this court to interpret the allegations of the petition, giving due effect to the immigration records filed with the petition and with respondent's return. *Low Wah Suey v. Backus*, 225 U. S. 460, 469, 472, 32 Sup. Ct. 734, 56 L. Ed. 1165.

It is not disputed that if petitioner is the son of Kwock Tuck Lee and his wife, Tom Ying Shee, he was born to them when they were permanently domiciled in the United States, is a citizen thereof, and is entitled to admission to the country. *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. But while it is conceded that he is certainly the same person who, upon full investigation was found, in March, 1915, by the then Commissioner of Immigration, to be a natural born American citizen, the claim is that that Commissioner was deceived and that petitioner is really Lew Suey Chong, who was admitted to this country in 1909, as a son of a Chinese merchant, Lew Wing Tong, of Oakland, Cal.

[2] It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were

\*458  
"such as to prevent a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute, *Low Wah Suey v. Backus*, supra, or that "their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law," *Tang Tun v. Edsell*, Chinese Inspector, 223 U. S. 673, 681, 682,



32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, *Zakonaite v. Wolf*, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218.

As to the first ground of complaint in the petition for habeas corpus.

After the final decision by the Commissioner of Immigration adverse to petitioner, his counsel requested an opportunity to examine the record on which it was rendered. This request was granted, and promptly, thereafter, demand was made for permission to see the testimony referred to, but not reported, in a designated report of Inspector Wilkinson. Assistant Commissioner Boyce answered this request saying:

"The portion of Inspector Wilkinson's report which was withheld from you contained no evidence whatsoever and nothing material to the issue in this case. As a matter of fact this inspector's report in no way influenced my decision and was useful only in locating other material witnesses, whose testimony appears in the record."

This report appears in the record before us and is of a remarkable character. It is dated August 8th and after saying that "only upon the assurance that the identity of the witness would be kept secret" could the information contained in it be obtained, the writer proceeds with much detail to narrate what, if believed, would be evidence of first importance making against the claim of petitioner. The report continues that after his

\*459  
first visit the inspector returned to Monterey and learned from his confidential witness that in the interval he had inquired of "an old Chinese resident," who said that, "Tuck Lee had no son," and adds, "I was unable to ascertain the name of this Chinese person."

On the margin of this letter is written August 8, 1917: "Approved. Edward White" (the Immigration Commissioner).

In this manner, with much detail, statements of a person who must remain unknown, and in part derived from another person who must remain unknown, were communicated by the investigating inspector to his superior, who was to dispose of the case on the evidence which was furnished him, and he, in form at least, approved of this report. This approval is explained by the Acting Commissioner as referring to the recommendation contained in it that further investigation should be made, and there is confirmation of this explanation in the fact that the record shows that immediately thereafter evidence of the character suggested in the report was taken in affidavits which were open to the inspection of the petitioner. While we would not give the weight to these affidavits which the Commissioner of Immigration and the Secretary of Labor seem to have given to them, nevertheless, when taken with the

statement of the Acting Commissioner that the inspector's report objected to was not allowed to influence his decision, we might not say that the taking and reporting of the testimony objected to of witnesses whose names are not disclosed, rendered the hearing so manifestly unfair as to require reversal, if there were nothing else objectionable in the record.

There remains the question whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law because an inspector failed to record in its proper place an

\*460  
important part of the testimony of three white witnesses called by the petitioner.

A discussion of what the record shows and of the character of the witnesses involved will be necessary to an appreciation of the importance, in determining the issue presented, of having a full report of what was said and done by these three witnesses.

When the petitioner, before going to China, applied for a preinvestigation of his claimed status as an American citizen, three white witnesses from Monterey were called in his behalf—two of whom were notable.

Ernest Michaelis, for 26 years a justice of the peace and for many years the official collector of fish licenses, testified, making reference, for purpose of identification, to a photograph of the petitioner. He said he had known the parents of the boy since shortly after he himself went to live at Monterey in 1879; that there were two boys and three girls in the family; that he had seen the petitioner frequently as a little fellow when he went to collect fish licenses (the boy's father was a fisherman); and had known him ever since; and, referring to the photograph, he declared positively that he was sure of his identity and that he was born in Monterey. He added that the father of the boy was native born and was a voter in that community.

W. E. Parker testified that he had been agent for the Wells Fargo Company at Monterey for 25 years, and was also chief of the fire department and city clerk for many years. He said, referring to a photograph of petitioner, that he had known the parents of the boy for many years and the boy himself since he was 5 or 6 years old; that he remembered two boys and at least one girl, but later he stated that he recalled that there were three girls in the family, and his identification of the petitioner by photograph was very definite. He stated that the father of the boy

\*461  
was a fisherman and shipped fish frequently by express so that he came to know him well and his wife also because she often transacted business for her husband. He recalled that after the fire and earthquake the petitioner was sent to school at San Francisco, but returned to Monterey every few months when he saw him.

A third witness, Manuel Ortin, a retired business man, gave similar testimony, but it is not so definite and circumstantial as that of the others and need not be detailed.

The government inspector to whom the case in this preliminary stage was referred, wrote the Commissioner of Immigration at San Francisco that the testimony of petitioner, of his alleged brother, his mother and three credible white witnesses had been taken; that the petitioner gave his testimony mostly in English, presented a good appearance, and "tells his story in a straightforward manner in a way to convince one that he is telling the truth," and that "the three white witnesses are representative men of this town and would have no motive in misstating the facts." He concluded with the statement that in his mind there was no doubt that the Chinaman named Kwock Tuck Lee (claimed by applicant to be his father) had lived in Pacific Grove (the Chinatown of Monterey), and was a registered voter there; that he was married and had several children and that the testimony seemed to prove that the petitioner was a member of his family. He added that a sister of the boy lived at a given number in Chicago and suggested that her testimony should be taken. This sister's testimony was taken, as recommended, and then the inspector reported to the Commissioner of Immigration that her testimony did not vary in the main from that of the mother or brother of the petitioner; that "the white witnesses, Judge Michaelis, and chief of the fire department and Wells Fargo agent, and retired grocer, Mr. Ortin, are men of standing in this town" and that he had no reason to doubt their testimony. He added that, tak-

\*462

ing the testimony as a whole, "he \*believed the applicant made a good showing and recommended favorable action." On this record the application was approved and the young man went to China.

When the petitioner returned from China and the investigation was renewed Michaelis, Ortin, and another important white witness, Pugh, were examined at San Francisco by an inspector. Michaelis and Ortin testified substantially as they had done a year before, and Pugh, also a business man of Monterey, gave similar testimony and definitely identified the petitioner as the son of Kwock Tuck Lee. The examination of these witnesses, by question and answer, was taken down and is in the record, but no reference whatever was made to the fact that the petitioner was brought into their presence to test their recognition of him and his recognition of them, or of any examination in his presence. The testimony was in this form when it was sent to the Commissioner of Immigration for his consideration and decision, and, acting upon it, on September 6, 1917, he denied the petitioner admission to the country. After this decision, on September 12th, counsel for

petitioner wrote the Commissioner that Michaelis, Pugh, and Ortin had told him that when they were examined at San Francisco they were confronted with the petitioner and that they recognized him, that he recognized them, and that the examining inspector was present and asked a number of questions, which were answered, and calls this to the attention of the Commissioner "as it may have been an oversight on the part of the official stenographer in recording everything said and done at the hearing of the case." On the same date affidavits by Michaelis, Pugh and Ortin were filed, in each of which, after referring to his examination at San Francisco, the affiant says in substance, as Michaelis does in form, that "after being questioned by the inspector the affiant was confronted with Kwock Jan Fat who met him while the inspector was present and that said inspector

\*463

\*heard everything said between affiant and Kwock Jan Fat;" and that affiant then told the inspector that the petitioner was the son of Tuck Lee, that he had known him from infancy, and that he was a native of Monterey.

To this letter of counsel for petitioner an Acting Commissioner replied, saying:

"With regard to the identification of the applicant by Messrs. Michaelis, Pugh and Ortin, you are advised that these witnesses were confronted with the applicant with the result that said witnesses mutually recognized and identified the applicant as the person whom they had known as Kwock Jan Fat, and the applicant was equally prompt in recognizing said witnesses. While I was advised of this incident and gave it full consideration in arriving at my decision, it was not made of record in connection with the statements taken from the witnesses. A copy of this letter will be placed with the record as evidence to the fact that there was mutual recognition between said witnesses and the applicant which will thus be available for the consideration of the Secretary on appeal."

This excerpt from the letter of an Acting Commissioner (the decision was rendered by the Commissioner personally) is the only form in which the facts and circumstances of the recognition of the petitioner by these important witnesses and their examination in his presence by the inspector was placed before the Secretary of Labor, and apparently there was no record whatever of either before the Commissioner of Immigration when he decided the case.

[3] Comment cannot add to the impression which this plain statement of facts should make upon every candid mind. Here was testimony being taken which was to become the basis for decision by men who must depend wholly upon the report of what was said and done by the witnesses. The men examined were important, intelligent and very

\*464

\*certainly as dependable as any who were called. All they had said with respect to the



identity and nativity of the petitioner when his photograph was exhibited to them was carefully reported, but when their knowledge of him and their acquaintance with him was put to the final test of having him brought before them (he had then been in China for a year), nothing whatever was recorded of what they said and did. Very certainly this must be regarded as such an important part of the testimony of these most important witnesses that it may well have been of such character as to prove sufficient to determine the result in a case even much stronger against a claim of United States citizenship than was made in this record against the claim of petitioner, and a report which suppressed or omitted it was not a fair report and a hearing based upon it was not a fair hearing within the definition of the cases cited.

[4] The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.

\*465

\*The practice indicated in *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits.

Judgment reversed.

Writ of habeas corpus to issue.

(253 U. S. 442)

NADEAU et al. v. UNION PAC. R. CO.

(Argued Jan. 9 and 12, 1920. Decided June 7, 1920.)

No. 119.

1. PUBLIC LANDS §92—INDIAN LANDS HELD "PUBLIC LANDS" WITHIN ACT GRANTING RAILROAD RIGHT OF WAY.

Under the treaty of 1846 with the Pottawatomie Indians, by which the United States

agreed to grant possession and title to specified land, and the treaty of 1861, providing for allotments in severalty to members of the tribe, where allotments had not been made until after 1862, such lands were "public lands" of the United States, within Act July 1, 1862, § 2, granting a right of way to a railroad where it passed over public lands.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Land.]

2. PUBLIC LANDS §92—GRANT OF RAILROAD RIGHT OF WAY TO RECEIVE LIBERAL CONSTRUCTION.

A grant of a right of way through the public lands to a railroad company stands upon a different footing from private grants, and is not to be regarded as bestowing a bounty on the railroad, and should receive a liberal construction.

3. INDIANS §10—LANDS GRANTED TO TRIBE UNTIL ALLOTTED HELD UNDER ORDINARY INDIAN CLAIM.

Under the treaty of 1846 with the Pottawatomie Indians, whereby the United States agreed to grant possession and title to a district 30 miles square, and the treaty of 1861, providing for allotments in severalty to the members of the tribe, the lands, until actually allotted in severalty, were held by the tribe under the ordinary Indian claim under which the Indians had a mere right of possession and occupancy, with the fee in the United States.

4. INDIANS §10—CONGRESS AUTHORIZED TO LEGISLATE RESPECTING LANDS HELD UNDER ORDINARY INDIAN CLAIM.

Congress, as guardian for the Indians, has power to legislate in respect of lands held by an Indian tribe under the ordinary Indian right of possession and occupancy, with the fee in the United States.

5. PUBLIC LANDS §92—GRANT OF RIGHT OF WAY EFFECTIVE AS OF DATE OF ACT.

The grant by Act July 1, 1862, § 2, of a railroad right of way through the public lands was present and absolute, and upon identification of the route took effect as of the date of the act, and all thereafter acquiring public lands took subject to such granted right.

Mr. Justice Clarke dissenting.

In Error to the District Court of the United States for the District of Kansas.

Action by the Union Pacific Railroad Company against Joseph E. Nadeau and others. Judgment for plaintiff, and defendants bring error. Affirmed.

\*443

\*Mr. A. E. Crane, of Topeka, Kan., for plaintiffs in error.

Messrs. R. W. Blair, of Topeka, Kan., and N. H. Loomis, of Omaha, Neb., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Defendant in error brought this action to obtain possession of certain lands, formerly

part of the Pottawatomie Indian Reservation and now in Pottawatomie county, Kan., which lie in the margins of the 400-foot strip claimed by it as legal successor to the original grantee. Counsel for plaintiffs in error well say but one question is presented for our determination:

"Were the lands involved in this action 'public lands' within the meaning of the acts of Congress dated July 1, 1862, and July 2, 1864, granting a right of way to the Leavenworth, Pawnee and Western Railroad Company and its successors."

The cause was tried by the court below upon pleadings and agreed statement of facts; and a memorandum states the reasons for judgment favorable to the railroad.

[1] By the act of July 1, 1862 (12 Stat. 489, c. 120, § 2), Congress granted a right of way "two hundred feet in width on each side of said railroad where it may pass over the public lands" (*Stuart v. Union Pacific Railroad Company*, 227 U. S. 342, 345, 33 Sup. Ct. 338, 57 L. Ed. 535), and declared:

"The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required  
\*444  
for the said \*right of way and grants herein-after made."

Some amendments added by the act of July 3, 1866 (14 Stat. 79) are not specially important here.

It is said that under treaties of 1846 and 1861 with the United States (9 Stat. 853; 12 Stat. 1191) the Pottawatomie Reservation was no part of the "public lands"; moreover that Congress lacked power to grant rights therein to a railroad company.

[2] In *Kindred v. Union Pacific Railroad Co.*, 225 U. S. 582, 596, 32 Sup. Ct. 780, 56 L. Ed. 1216, lands in the Delaware Diminished Indian Reservation—east of the Pottawatomies—were declared "public lands" within the intentment of the right of way clause, act of 1862, although then actually occupied by individual members of the Tribe under assignments executed as provided by treaty. That case renders clear the definite purpose of Congress to treat Indian Reservations, subject to its control, as public lands within the right of way provision. This provision is not to be regarded as bestowing bounty on the railroad; it stands upon a somewhat different footing from private grants, and should receive liberal construction favorable to the purposes in view. *United States v. Denver & Rio Grande Railway Co.*, 150 U. S. 1, 8, 14, 14 Sup. Ct. 11, 37 L. Ed. 975.

Whether Congress had power to make grants in respect of the lands here involved must be determined upon a consideration of their history.

November 14, 1862, the railroad company accepted the act of 1862, and during 1865 and 1866 duly constructed its road through

the Pottawatomie Reservation—so far as appears, without protest or objection.

By the treaty of 1846 (article 4) the United States agreed to grant to the Pottawatomie Indians possession and title to a district 30 miles square, on the Kansas river, and to guarantee full and complete possession thereof "as their land and home forever." 9 Stat. 854.

In 1861 the same parties entered into an-

other treaty \*which stipulated (articles 1 and 2) that land within the reservation designated by the treaty of 1846 should be allotted thereafter in severalty to tribal members who had acquired customs of the whites, and desired separate tracts; that the United States' agent should take an accurate census showing those desiring to hold in severalty and those desiring to hold in common, and "thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs," specified amounts of land "to include, in every case, as far as practicable, to each family their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey." "When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs."

Article 5, treaty of 1861, offered certain privileges to the railroad company which were never accepted; the road was not constructed as provided by the treaty, but under the act of Congress.

Subsequent to July 1, 1862, a census was duly taken; commissioners, appointed January 16, 1863, made allotments, and in November, 1863, submitted their report. The Secretary of the Interior, December 12, 1864, approved allotments for the lands now involved to tribal members having improvements thereon before the treaty of 1861, and who had continued to live there. Patents thereto issued at different dates, the earliest being June 14, 1867, without expressly reserving a right of way for the railroad. Plaintiffs in error claim through mesne conveyances from those who received such allotments and patents.

[3, 4] It seems plain that, at least, until  
\*446  
actually allotted in \*severalty (1864) the lands were but part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. *Beecher v. Wetherby*, 95 U. S. 517, 525, 24 L. Ed. 440. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation v. Southern Kansas Rail-*



way Co., 135 U. S. 641, 653, 10 Sup. Ct. 965, 34 L. Ed. 295; *United States v. Rowell et al.*, 243 U. S. 464, 468, 37 Sup. Ct. 425, 61 L. Ed. 848; *United States v. Chase*, 245 U. S. 89, 38 Sup. Ct. 24, 62 L. Ed. 168.

[5] The grant of the right of way in 1862, was present and absolute and upon identification of the route, took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right. *Railroad Co. v. Baldwin*, 103 U. S. 426, 430, 26 L. Ed. 578. Although parties to the treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.

Any claim by plaintiffs in error based upon adverse occupancy or possession is precluded by *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Northern Pacific Railroad Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pacific Railroad Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639; *Kindred v. Union Pacific Railroad Co.*, supra, 597 of 225 U. S., 32 Sup. Ct. 780, 56 L. Ed. 1216.

We find no error in the judgment below, and it is affirmed.

Mr. Justice CLARKE dissents.

Mr. Justice HOLMES, Mr. Justice PITNEY, and Mr. Justice BRANDEIS did not participate in consideration or decision of this case.

(253 U. S. 421)

FEDERAL TRADE COMMISSION v. GRATZ  
et al.

(Argued April 20 and 21, 1920. Decided  
June 7, 1920.)

No. 492.

1. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 80½,  
New, vol. 8A Key-No. Series—FEDERAL  
TRADE COMMISSION'S ORDER TO DESIST FROM  
UNFAIR COMPETITION MUST BE BASED ON  
SUFFICIENT COMPLAINT.

Under Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), providing that, when the Federal Trade Commission has reason to believe that a person, etc., has used an unfair method of competition, it shall formulate and serve a complaint, stating the charges, and after a hearing, if it deems the method of competition in question prohibited thereby, shall issue an order requiring the accused to cease and desist from using such method, if the complaint is plainly insufficient to show unfair competition, there is no foundation for an order to desist.

2. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 80½,  
New, vol. 8A Key-No. Series—FEDERAL  
TRADE COMMISSION'S ORDER MUST FOLLOW  
COMPLAINT.

An order of the Federal Trade Commission to cease and desist from using a specified meth-

od of competition, under Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court.

3. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 80½,  
New, vol. 8A Key-No. Series—WHAT CONSTITUTES UNFAIR METHODS OF COMPETITION A QUESTION FOR THE COURT.

Under Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), declaring unfair methods of competition in commerce unlawful, it is for the courts, and not for the Federal Trade Commission, ultimately to determine as matter of law what constitutes unfair methods of competition.

4. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 68—  
"UNFAIR METHODS OF COMPETITION" DO NOT  
INCLUDE PRACTICES NOT HERETOFORE CON-  
DEMNED.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), declaring "unfair methods of competition" unlawful, does not apply to practices never heretofore regarded as opposed to good morals, because characterized by deception, bad faith, fraud, or oppression, or as against public policy, because of their dangerous tendency unduly to hinder competition or create monopoly.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

5. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 80½,  
New, vol. 8A Key-No. Series—COMPLAINT  
FILED BY FEDERAL TRADE COMMISSION IN-  
SUFFICIENT TO SHOW UNFAIR METHODS OF  
COMPETITION.

A complaint filed by the Federal Trade Commission under Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), charging that sellers of cotton ties and bagging and their selling and distributing agents, with the purpose and effect of discouraging and stifling competition in the sale of such bagging, had refused to sell ties, unless the purchaser would buy from them a corresponding amount of bagging, was insufficient to support an order to desist from such practice, where it did not intimate that they did not properly obtain their ties and bagging, or state the amount controlled by them, or allege that they held a monopoly of either ties or bagging, or had ability, purpose, or intent to acquire one, or allege anything justifying the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint.

6. TRADE-MARKS AND TRADE-NAMES  $\hookrightarrow$ 68—  
MERCHANT MAY REFUSE TO SELL COTTON TIES  
AND BAGGING, EXCEPT IN CONJUNCTION.

All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as steel ties used for binding bales of cotton, and jute bagging used to wrap such bales.

Mr. Justice Brandeis and Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Proceeding by Anderson Gratz and another, doing business as Warren, Jones & Gratz, and others, against the Federal Trade Commission, to set aside an order of the Commission. The order was annulled by the Circuit Court of Appeals for the Second Circuit (258 Fed. 314, 169 C. C. A. 330), and the Commission brings certiorari. Affirmed.

See, also, 250 U. S. 657, 40 Sup. Ct. 13, 63 L. Ed. 1193.

Messrs. Huston Thompson, of Washington, D. C., Alexander C. King, of Atlanta, Ga., and Claude R. Porter, of Washington, D. C., for petitioner.

Mr. Thomas F. Magner, of Brooklyn, N. Y., for respondents.

\*422

\*Mr. Justice McREYNOLDS delivered the opinion of the Court.

By an act approved September 26, 1914 (chapter 311, 38 Stat. 717 [Comp. St. §§ 8836a-8836k]), Congress made provision for the Federal Trade Commission and declared its powers.

Section 4 (section 8836d) defines commerce as:

"Commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation or between the District of Columbia and any state or territory or foreign nation."

Section 5 (section 8836e):

"That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce. Whenever the commission shall have reason to believe that any such person, partnership, or corporation, has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. \* \* \* If upon such hearing the commission shall be of the opinion that the method of com-

\*423

petition in question is prohibited \*by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or cor-

poration to cease and desist from using such method of competition."

Section 5 further provides that the commission may apply to the designated Circuit Court of Appeals to enforce an order—

"and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. \* \* \* The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided by section 240 of the Judicial Code. Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the

\*424

commission for an \*enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive."

Sections 6 and 7 (sections 8836f, 8836g) empower the commission to require reports and compile information concerning corporations; to inquire concerning execution of decrees restraining violations of the anti-trust acts; to investigate alleged violations of such acts; to recommend readjustments of corporate business; to publish information and make reports to Congress; to classify corporations and make rules and regulations; to investigate trade conditions; to act, under orders of the court, as a master in chancery in certain designated circumstances, etc.

Undertaking to proceed under section 5, June 4, 1917, the commission issued a complaint containing two counts against respondents. The first related to unfair methods of competition, and the second charged violation of section 3 of the Clayton Act, approved October 15, 1914 (chapter 323, 38 Stat. 730 [Comp. St. § 8835c]). Respondents denied both charges. After taking much testimony the commission held there was no evidence to support the second count; but it ruled that respondents had practiced unfair competition and ordered that they—



"their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind."

Upon respondents' petition the Circuit Court of Appeals, Second Circuit, annulled the commission's order. 258 Fed. 314, 169 C. C. A. 330. It said:

"We think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the

American Manu\*facturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances."

The challenged order is based solely upon the first count of the complaint which follows:

"Federal Trade Commission v. Anderson Gratz and Benjamin Gratz, Copartners Doing Business under the Firm Name and Style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh, Copartners Doing Business under the Firm Name and Style of P. P. Williams & Co., and Charles O. Elmer.

"The Federal Trade Commission having reason to believe, from a preliminary investigation made by it, that Anderson Gratz and Benjamin Gratz, copartners doing business under the firm name and style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh, copartners doing business under the firm name and style of P. P. Williams & Co., and Charles O. Elmer, all of whom are hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief, as follows:

"I.

"Paragraph 1: That the respondents Anderson Gratz and Benjamin Gratz are copartners doing business under the firm name and style of Warren, Jones & Gratz, having their principal

office and place of business \*in the city of St. Louis and state of Missouri, and are engaged in the business of selling, in interstate commerce, either directly to the trade, or through the respondents hereinafter named, steel ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Company of Pittsburgh, Pennsylvania, and also selling, in the same manner, jute bagging, used to wrap bales of

cotton, and which jute bagging is manufactured by the American Manufacturing Company, of St. Louis, Missouri.

"Paragraph 2: That the respondents P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh are copartners doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg and state of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans and state of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners, and farmers.

"Paragraph 3: That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging."

It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the commission and effect

of the evidence presented. The \*judgment below must be affirmed, since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the fair intendment of those words. We go no further and confine this opinion to the point specified.

When proceeding under section 5 it is essential, first, that, having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding "in respect thereof would be to the interest of the public"; next, that it formulate and serve a complaint stating the charges "in that respect," and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If after a hearing the commission shall deem "the method of competition in question is prohibited by this act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

[1, 2] If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvi-

dent and, when challenged, will be annulled by the court.

[3,4] The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder compe-

\*428  
tition or create monopoly. The act was \*certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

[5] Count 1 alleges, in effect: That Warren, Jones & Gratz are engaged in selling, either directly to the trade or through their correspondents, cotton ties produced by the Carnegie Steel Company and also jute bagging manufactured by the American Manufacturing Company. That P. P. Williams & Co., of Vicksburg, and C. O. Elmer, of New Orleans, are the selling and distributing agents of Warren, Jones & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers, who resell them to retailers, ginners, and farmers. That with the purpose and effect of discouraging and stifling competition in the sale of such bagging all the respondents for more than a year have refused to sell any of such ties unless the purchaser would buy from them a corresponding amount of bagging—six yards with as many ties.

The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

[6] Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to

\*429  
exercise reasonable discretion \*in respect of his own business methods must be preserved. *United States v. Colgate*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992; *United States v. A. Schrader's Son, Inc.* (March 1, 1920), 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471.

The first count of the complaint fails to

show any unfair method of competition practiced by respondents and the order based thereon was improvident.

The judgment of the court below is Affirmed.

Mr. Justice PITNEY concurs in the result.

Mr. Justice BRANDEIS dissenting, with whom Mr. Justice CLARKE concurs.

First. The court disposes of the case on a question of pleading. This, under the circumstances, is contrary to established practice. The circumstances are these:

The pleading held defective is not one in this suit. It is the pleading by which was originated the proceeding before the Federal Trade Commission, an administrative tribunal, whose order this suit was brought to set aside. No suggestion was made in the proceeding before the commission that the complaint was defective. No such objection was raised in this suit in the court below. It was not made here by counsel. The objection is taken now for the first time and by the court.

This suit, begun in the Circuit Court of Appeals for the Second Circuit, was brought to set aside an order of the Federal Trade Commission. Before the latter the matter involved was thoroughly tried on the merits. There was a complaint and answers. Thirty-five witnesses were examined and cross-examined. A report of proposed findings as to facts was submitted by the examiner and exceptions were filed thereto. Then, the case was heard before the commission, which made a finding of facts, stated its conclusions as to the law, and ultimately issued the order in question. The proceedings occupied

\*430  
more \*than 16 months. The report of them fills 400 pages of the printed record. In my opinion it is our duty to determine whether the facts found by the commission are sufficient in law to support the order, and also, if it is questioned, whether the evidence was sufficient to support the findings of fact.

Second. If the sufficiency of the complaint is held to be open for consideration here, we should, in my opinion, hold it to be sufficient. The complaint was filed under section 5 of the Federal Trade Commission Act which declares unlawful "unfair methods of competition in commerce," empowers the commission to prevent their use, and directs it to issue and serve "a complaint stating its charges in that respect" whenever it has reason to believe that a concern "has been or is using" such methods. The function of the complaint is solely to advise the respondent of the charges made so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime like an indictment or information, nor the elements of a cause of action like a declaration at law or a bill in equity. All that is requisite in a complaint



before the commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence. The practice of the Federal Trade Commission in this respect, as in many others, is modeled on that which has been pursued by the Interstate Commerce Commission for a generation and has been sanctioned by this as well as the lower federal courts. *United States Leather Co. v. Southern Ry. Co.*, 21 Interst. Com. Com'n R. 323, 324; *Clinton Sugar Refining Co. v. C. & N. W. Ry. Co.*, 28 Interst. Com. Com'n R. 364, 367; *Stuarts Draft Milling Co. v. Southern Ry. Co.*, 31 Interst. Com. Com'n R. 623, 624; *New York Central, etc., R. R. Co. v. Interstate Commerce Commission (C. C.)* 163 Fed. 131, 138, 139; *Dickerson v. Louisville & Nashville R. R. Co. (C. C.)* 187 Fed. 874, 878; *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 \*U. S. 197, 215, 16 Sup. Ct. 666, 40 L. Ed. 940; *Cincinnati, Hamilton & Dayton Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 149, 27 Sup. Ct. 648, 51 L. Ed. 995.

The complaint here under consideration stated clearly that an unfair method of competition had been used by respondents, and specified what it was, namely, refusing to sell cotton ties unless the customer would purchase with each six ties also six yards of bagging. The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the act to regulate commerce imposes (Comp. St. § 8565). It is unnecessary to set forth why the rate specified was unjust or why the preference specified is undue or unreasonable, because these are matters not of law but of fact to be established by the evidence. *Pennsylvania Co. v. United States*, 236 U. S. 351, 361, 35 Sup. Ct. 370, 59 L. Ed. 616. So far as appears neither this nor any other court has ever held that an order entered by the Interstate Commerce Commission may be set aside as void, because the complaint by which the proceeding was initiated, failed to set forth the reasons why the rate or the practice complained of was unjust or unreasonable; and I cannot see why a different rule should be applied to orders of the Federal Trade Commission issued under section 5.<sup>1</sup>

<sup>1</sup> See Report Senate Committee on Interstate Commerce, June 13, 1914, Sixty-Third Congress, Second Session, No. 597, p. 13: "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opin-

\*432

\*In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. And what it is brought to prevent is not the commission of *acts* of unfair competition, but the pursuit of unfair *methods*. Furthermore, the order is not self-executory. Standing alone it is only informative and advisory. The commission cannot enforce it. If not acquiesced in by the respondents, the commission may apply to the Circuit Court of Appeals to enforce it. But the commission need not take such action, and it did not do so in respect to the order here in question. Respondents may, if they see fit, become the actors and ask to have the order set aside. That is what was done in the case at bar.

The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade, and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some of the states as early as 1889. In 1890 Congress passed the Sherman Law (Comp. St. §§ 8820-8823, 8827-8830).

\*433

It was followed by much \*legislation in the states<sup>2</sup> and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry, and the farm implement industry. A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this court rendered its decision in *Standard*

ion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

<sup>2</sup> See *Laws on Trusts and Monopolies*, Compiled under direction of the Clerk of the House Committee on the Judiciary, Sixty-Third Congress, by Nathan B. Williams, Revised January 10, 1914; also *Trust Laws and Unfair Competition (Federal) Bureau of Corporations*, March 15, 1915.

Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and in American Tobacco Co. v. United States, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter view prevailed in the Sixty-Third

\*434

Congress.\* The Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman law. The Federal Trade Commission Act (Act Sept. 26, 1914, c. 311, 38 Stat. 717) created an administrative tribunal, largely with a view to regulating competition.

Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by section 5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.<sup>4</sup> As Standard Oil rebates led to the creation of the Interstate Commerce Commission,<sup>5</sup> other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that, as the former had substantially eliminated rebates, the latter might put an end to all other unfair trade practices,

and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines; and the machinery employed was substantially similar.

In undertaking to regulate competition through the Trade Commission, Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade:

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead

\*435

of enjoining the \*continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the commission. The potency of accomplished facts had already been demonstrated. The task of the commission was to protect competitive business from further inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act. And it should do this by filing a complaint with a view to a thorough investigation; and, if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.<sup>6</sup>

<sup>6</sup> Senator Cummins, chairman of the committee which reported the bill, said (Cong. Rec. vol. 51, p. 11455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the anti-trust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the anti-trust law. The purpose of this bill in this section and in other sections which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last 25 years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the anti-trust law under the decisions of the court in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the states. It is these considerations which, in my judgment, have made it wise, if not necessary to supplement the anti-trust law by additional legislation, not in antagonism to the anti-trust law, but in harmony with the anti-trust law, to more effectively put into the industrial life to America the principle of the anti-trust law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. \* \* \*"

<sup>5</sup> See Report of Senate Committee on Interstate Commerce, June 13, 1914, Sixty-Third Congress, Second Session, No. 597, p. 10, reporting the bill:

"Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. \* \* \*

"The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea.

<sup>4</sup> "Unfair Competition," by William S. Stevens, Political Science Quarterly (1914) p. 283; "The Morals of Monopoly and Competition" (1916) by H. B. Reed.

<sup>6</sup> See Railway Problems by William Z. Ripley (1907) p. x.



\*436

\*(2) Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the commission.<sup>7</sup> Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances,

\*437

be entirely unobjectionable.<sup>8</sup> \*Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of century earlier, when by the act to regulate commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage.<sup>9</sup> See *Pennsylvania Co. v. United States*, supra, 236 U. S. 361, 35 Sup. Ct. 370, 59 L. Ed. 616; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the commission the duty of finding the facts,

<sup>7</sup> See Report Senate Committee on Interstate Commerce, June 13, 1914, Sixty-Third Congress, Second Session, No. 597, p. 13: "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better. \* \* \*" See also "Unfair Competition," by W. H. S. Stevens (University of Chicago Press, 1916) pp. 1, 2. For laws prohibiting specific acts of unfair competition, see "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (March 15, 1915) pp. 184, 199.

<sup>8</sup> Report of (Federal) Bureau of Corporations on the International Harvester Co., March 3, 1913, p. 30: "In discussing the competitive methods of the company it should be recognized that some practices which might be regarded with indifference if there were a number of competitors of substantially equal size and power may become objectionable when one competitor far outranks not only its nearest rival, but practically all rivals combined, as is true of the International Harvester Company, so far as several of its most important lines are concerned."

The Australian Industries Preservation Act, 1903-1910, expressly declares that "unfair competition means competition which is unfair in the circumstances." "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (March 15, 1915) pp. 552, 747.

<sup>9</sup> See note 1, supra.

and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court. Compare *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

Third. Such a question of law is presented to us for decision, and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer, except upon condition that the purchaser will buy from him also

\*438

his \*trade requirements in another article or articles, reasonably be found by the commission to be an unfair method of competition under the circumstances set forth in the findings of fact? If we were called upon to consider the sufficiency of the complaint, and that merely, the question for our decision would be, whether the particular practice could, under any circumstances, reasonably be deemed an unfair method of competition. But as this suit to set aside the order of the commission brings before us its findings of fact, we must determine whether these are sufficient to support their conclusion of law that the practice constituted—

"under the circumstances therein set forth, unfair methods of competition in interstate commerce against other manufacturers, dealers and distributors in the material known as sugar-bag cloth, and against manufacturers, dealers and distributors of the bagging known as rewoven bagging and second-hand bagging in violation of" the statute.

It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in co-operation. Similarly what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of resources.<sup>10</sup> Without providing for those cases where the method of competition here involved would

\*439

be unobjectionable, \*Massachusetts legislated against the practice, as early as 1901, by a

<sup>10</sup> See "The Morals of Monopoly and Competition," by H. B. Reed (1916) pp. 120-122.

statute (chapter 478) of general application. Its highest court, in applying the law which it held to be constitutional, described the prohibited method as "unfair competition." *Commonwealth v. Strauss*, 188 Mass. 229, 74 N. E. 308; *Id.*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842. Compare *People v. Duke*, 19 Misc. Rep. 292, 44 N. Y. Supp. 336. The (Federal) Bureau of Corporations held the practice, which it described as "full-line forcing" to be highly reprehensible.<sup>11</sup> Congress, by section 3 of the Clayton Act, specifically prohibited the practice in a limited field under certain circumstances. An injunction against the practice has been included in several decrees in favor of the government entered in cases under the Sherman Law.<sup>12</sup> In the decree by which the American Tobacco Company was disintegrated pursuant to the mandate of this court, each of the fourteen companies was enjoined from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it. \* \* \*" *United States v. American Tobacco Co. (C. C.)* 191 Fed. 371, 429. The practice here in question is merely one form of the so-called "tying clauses" or "conditional requirements" which have been declared in a discerning study of the whole subject to be "perhaps the most interesting of any of the methods of unfair competition."<sup>13</sup>

The following facts found by the commission, and which the Circuit Court of Appeals held were supported by sufficient evidence,

\*440

show that the conditions in the \*cotton tie and bagging trade were in 1918 such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition: Cotton, America's chief staple, is marketed in bales. To bale cotton, steel ties and jute bagging are essential. The Carnegie Steel Company, a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton tie situation in the United States and is able to fix and control the price of such ties throughout the country. The American Manufacturing Company manufactures about 45 per cent. of all bagging used for cotton baling; one other company about 20 per cent.; and the remaining 35 per cent. is made up of second hand bagging and a material called

sugar-bag cloth. Warren, Jones & Gratz, of St. Louis, are the Carnegie Company's sole agents for selling and distributing steel ties. They are also the American Manufacturing Company's sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Company, Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby it was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing states were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Company in order to procure a sufficient supply of steel ties.

\*441

\*These are conditions closely resembling those under which "full-line forcing," "exclusive-dealing requirements" or "shutting off materials, supplies or machines from competitors"—well-known methods of competition, have been held to be unfair, when practiced by concern holding a preponderant position in the trade.<sup>14</sup>

Fourth. The Circuit Court of Appeals set aside the order of the commission solely on the ground that it was without authority to determine the merits of specific individual grievances, and that the evidence did not support its finding that Warren, Jones & Gratz had—

"adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging."

The reason assigned by the Circuit Court of Appeals for so holding was that the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their "general practice." But the power of the Trade Commission to prohibit an unfair method of competition found to have been used is not limited to cases where the practice had become general. What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair methods of competition"; that is, the method or means by which an unfair

<sup>11</sup> Report of the (Federal) Bureau of Corporations on the International Harvester Company (March 3, 1913) p. 308.

<sup>12</sup> See "Unfair Methods of Competition and their Prevention" by W. H. S. Stevens, *Annals, American Academy of Political and Social Science* (1916) pp. 42, 43. "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (March 15, 1915) pp. 484-486, 493.

<sup>13</sup> "Unfair Competition," by W. H. S. Stevens (1916) p. 54.

<sup>14</sup> See "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (March 15, 1915) pp. 319-323, 328.



end might be accomplished. The commission was directed to act, if it had reason to believe that an "unfair method of competition in commerce has been or is being used." The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its

\*442

use before it became a general practice, that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted. As the Circuit Court of Appeals found that the evidence was sufficient to support the facts set forth above, and since on those facts the commission could reasonably hold that the method of competition in question was unfair under the circumstances, it had power under the act to issue the order complained of.

In my opinion the judgment of the Circuit Court of Appeals should be reversed.

---

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Decided June 7, 1920.)

No. 27.

In Equity.

Original suit by the State of Oklahoma against the State of Texas, in which the United States intervened. On motions by the Judsonia Developing Association and others for leave to file petitions in intervention. Motions granted.

See, also, 40 Sup. Ct. 353, 64 L. Ed. —; 40 Sup. Ct. 394, 64 L. Ed. —; 253 U. S. 465, 40 Sup. Ct. 580, 64 L. Ed. —; 40 Sup. Ct. 582, 64 L. Ed. —.

\*470

PER CURIAM. \*The motions of the Judsonia Developing Association, Burk Divide Oil Company No. 2 and others, Burk Divide Oil Company No. 3 and others, and Mellish Consolidated Placer Oil Company, for leave

\*471

to file petitions in intervention herein, are hereby granted; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920.

(253 U. S. 465)

---

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Decided June 7, 1920.)

No. 27.

Original suit by the State of Oklahoma against the State of Texas, in which the

United States intervened. On first report of receiver. Order entered instructing receiver.

See, also, 40 Sup. Ct. 353, 64 L. Ed. —; 40 Sup. Ct. 394, 64 L. Ed. —; 40 Sup. Ct. 580, 64 L. Ed. —; 40 Sup. Ct. 582, 64 L. Ed. —.

Order Instructing Receiver.

PER CURIAM. Upon consideration of the first report of Frederic A. Delano, receiver, in the above-entitled cause, and of the supplemental report of June 3, 1920, and the various suggestions of the United States, intervenor, and of the state of Texas, and of the several motions, applications, exceptions, and suggestions heretofore filed by parties claiming an interest in the subject-matter of this suit, it is this 7th day of June, A. D. 1920, adjudged and ordered that the action of said receiver in taking possession of and operating under his own management and control the property described in the order of this court of April 1, 1920, until the further order of this court, including the oil and gas wells and plants, toll bridges, water plants, tank wagons, pipe lines, storage tanks, and other property located thereon and therein; the arrangements made by said receiver for guarding and policing said property; the office and

\*466

field organization created by \*him for the operation and development of the property and the resources thereof, and for collecting, conserving, and investing the proceeds of the sale of all oil, gas, gasoline, and other products taken therefrom since April 1, 1920, be, and they are hereby, ratified and approved.

2. So much of the land described in the order of this court of April 1, 1920, in range 14 west, as lies between the south edge of the present sand bed of the Red river (marked generally by the border line of vegetation along the edge of the flood plain) and the foot of the Texas bluff, as was on the 1st day of April, 1920, in the possession of persons claiming under patents from the state of Texas, and is not included in the river-bed lands, as hereinafter defined, shall be returned by the receiver to the several operators or claimants in possession on April 1, 1920, or their assigns, together with all wells, tanks, pipe lines, structures, equipment, and material, upon condition that such operator, claimant, or assigns account for, pay over to, and impound with the receiver, if not already done, three-sixteenths of the gross proceeds of all oil taken from the respective lands on and since April 1, 1920, and the royalty on commercial gas customary in the Burk-Burnett and Northwest Extension oil fields, and royalty on casing-head gas in accordance with the regulations and schedule of prices promulgated for Indian lands by the Secretary of the Interior August 10, 1917, the proceeds thereof to be either paid in cash, or the pay-

ment thereof within 90 days to be secured by good and sufficient surety to be approved by the receiver, and upon the further condition that said operator or claimant shall enter into an agreement in writing with the receiver, by the terms of which the operator shall develop and operate said properties in a workmanlike and businesslike manner, subject to the supervision of the receiver and to the orders of this court, and shall impound with the receiver three-sixteenths of the gross amount of the proceeds from the sale of

\*467

oil \*thereafter produced, and the royalty on gas and casing-head gas as hereinbefore specified. This agreement to contain such further stipulations as the receiver may deem proper for regulating the production of gas and oil and to prevent waste or the entrance of water to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits or the damage of wells in the possession of the receiver; and, provided further, that the receiver, in his discretion, may agree with any operator or claimant to operate for his benefit and at his expense the lands in said "Big Bend" area. Until the several operators or claimants comply with the foregoing conditions, the receiver shall retain possession of the respective properties and shall operate the same in accordance with the order of this court of April 1, 1920, as modified by this order.

In the event of failure or refusal of any operator to operate the property as directed by the receiver, or if any operator shall violate his agreement with the receiver, the receiver is authorized to take possession of and operate such property, impound three-sixteenths of the proceeds as provided by this order, and pay out of said proceeds the expenses of operation, keeping a separate account of the expense of production of each well as nearly as practicable.

3. The river-bed lands, for the purposes of this order, shall comprise all lands not hereinbefore excepted, being more specifically that part covered by the receivership of all the broad and approximately flat sandy stretch which extends from the foot of the bluff or the edge of the flood plain, as the case may be, on the south side of the river, to the midchannel of the river as defined in said order of April 1, 1920, and as it then existed including everything within the bounds just described.

4. It is further ordered that said receiver be and he is hereby authorized and directed, out of the gross proceeds derived from the

\*468

production of any well in the river-bed \*area paid to him since April 1, 1920: (1) To pay to the operator or operators of any such well the actual cost of operating the same since April 1, 1920, inclusive, including in such cost a reasonable allowance for field super-

vision, but excluding any allowance for general or office supervision; (2) to refund to those operators or drillers who have drilled and brought into production new wells in said area since April 1, 1920, a fair percentage of the entire actual cost of such work, including a reasonable allowance for field supervision, but excluding any allowance for general or office supervision; (3) to pay the just claims of mechanics and materialmen for work done and materials furnished on wells in said area brought in since April 1, 1920, and the claims of persons, associations, and corporations for advancements made in good faith for drilling operations upon such wells, provided satisfactory evidence of the existence of all of such claims be furnished.

5. Said receiver is further authorized and directed to release and surrender to the lawful owners thereof (1) all oil and gas stored within the receivership area which is shown by evidence satisfactory to him to have been produced by operations outside of said area; (2) all machinery, tools and other equipment stored within the receivership area when the receiver took possession and not actually used in the production, storage, transportation, etc., of the oil and gas products thereof, and such other machinery, tools, drilling rigs and similar apparatus found within the receivership area as may not be required for the receivership operations; (3) all oil, gas and the products thereof which are shown by evidence satisfactory to the receiver to have been produced by operations outside of the receivership area, but which were mingled and stored with similar products produced within said area on and subsequent to April 1, 1920.

6. Said receiver is further authorized and directed (1) to arrange for the sale and dis-

\*469

position of all oil, gas, \*gasoline, water, and other products of said property; (2) to take possession and license the operation of all toll bridges within the receivership area, and to regulate and limit the tolls chargeable thereon; (3) to sell at the best price obtainable, properly credit and account for, such derricks, tanks, pipe lines, tools, appliances and materials not claimed by the owners thereof and not required for the receiver's operations; (4) to purchase at the best price obtainable such tanks, machinery, appliances, tools, motor cars, and equipment, as may be necessary for the operation, protection, and development of the property in his charge; (5) to retain and employ whatever technical or other assistants he may require or may deem necessary to satisfactorily operate, develop and protect the property in his charge, fix the terms of employment and the rate of compensation; (6) to make such banking arrangements as he may deem necessary to



properly conserve and safeguard the funds resulting from his operations and to invest the surplus funds in the United States treasury certificates; (7) to make such contracts for fire, tornado, employé and public liability insurance as may be deemed necessary or advisable and take whatever other reasonable precautions are customarily employed in the management, operation, development, and protection of oil and gas properties of similar magnitude.

7. The receiver is hereby further authorized and directed to drill in the river-bed area described in paragraph 3 hereof, and bring into production whatever new wells he may be advised by his geologist and other experts are necessary for the conservation and development of the river-bed lands as a whole, pay the cost thereof out of the funds in his hands derived from the production of the wells in said river-bed area, keep separate accounts of the costs of drilling and operating and of the proceeds of the production of each well, and make a full report thereof, with his recommendations for the

\*470

equitable allocation and distribution of such costs and proceeds, as soon after the court reconvenes in October next as may be practicable.

8. In addition to the specific powers herein contained, the receiver, until the further order of this court, is hereby given whatever additional administrative powers may be found to be necessary to properly protect, operate, manage and develop the property within the receivership area and the oil and gas deposits therein.

9. The receiver is directed to report to the court, for such action as it may deem necessary and proper any interference with the property or operations in his charge and any violation of the orders and directions given by him in the performance of his official duties; and he may apply in vacation to the Chief Justice or any Associate Justice of this court for a writ of injunction in any case where an injunction might be granted by the court.

10. Nothing in the order of this court of April 1, 1920, or in this order shall be construed to prevent or in anywise obstruct the duly constituted authorities of the United States and of the states of Texas and Oklahoma in the exercise of their several and respective jurisdictions, as heretofore, in the prevention, detection and punishment of crime within the area embraced within the orders of this court.

The parties hereto and their respective officers and agents are requested to afford to the receiver and his agents all reasonable and appropriate assistance in guarding, protecting and conserving the property within said area.

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Decided June 7, 1920.)

No. 27.

In Equity.

Original suit by the State of Oklahoma against the State of Texas, in which the United States intervened. On motion of the United States and of complainant, requesting the cause to be set down for hearing on questions of law. Motion granted.

See, also, 40 Sup. Ct. 353, 64 L. Ed. —; 40 Sup. Ct. 394, 64 L. Ed. —; 253 U. S. 465, 40 Sup. Ct. 580, 64 L. Ed. —; 40 Sup. Ct. 580, 64 L. Ed. —.

\*471

PER CURIAM. \*On consideration of the motion of the United States and the state of Oklahoma, requesting that this cause be set down for hearing at an early day upon certain questions of law, and of the response of the state of Texas to said motion, this day presented:

It is ordered that this cause be and it is hereby set down for hearing on the 15th day of November, 1920, upon the following questions of law, to wit:

(1) Is the decree of this court in United States v. State of Texas, 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867, final and conclusive upon the parties to this cause, in so far as it declares that the treaty of 1819 between the United States and Spain (8 Stat. 252) fixed the boundary along the south bank of Red river?

(2) If said decree is not conclusive, then did the treaty of 1819, construed in the light of pertinent public documents and acts, fix the boundary along the mid-channel of Red river or along the south bank of said river?

It is further ordered that the parties be permitted to take and present testimony in respect of the governmental practice on the part of all governments and states, concerned at the time, bearing upon the construction and effect of said treaty as to the second question above stated.

The evidence in chief of the United States and the state of Oklahoma shall be taken and closed on or before August 15, 1920; the evi-

\*472

dence in chief of the state of Texas \*shall be taken and closed on or before October 1, 1920; and rebuttal testimony on the part of the United States and the state of Oklahoma shall be taken and closed on or before October 15, 1920. The evidence in each case to be taken on 7 days' notice, unless notice is waived.

Ernest Knaebel, Esq., of the District of Columbia, is hereby appointed as commissioner to take the said evidence and report the same to the court, without findings or conclusions.

## MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1919

(251 U. S. 542)

No. 128. OHIO VALLEY WATER COMPANY, plaintiff in error, v. BEN AVON BROUGH, et al. Jan. 12, 1920. In error to the Supreme Court of the State of Pennsylvania. See, also, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. —; 260 Pa. 289, 103 Atl. 744. Messrs. George B. Gordon, William Watson Smith, and John G. Buchanan, all of Pittsburgh, Pa., for plaintiff in error. Messrs. Berne H. Evans, of Harrisburg, Pa., and Leonard K. Guiler, David L. Starr, and Albert G. Liddell, all of Pittsburgh, Pa., for defendant in error.

PER CURIAM. Restored to the docket for reargument. The attention of counsel is directed to the question of whether under the State law the right to review the action of the commission was limited by the State statutes to the particular remedy which was here resorted to, or whether such statutes left open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the commission.

(253 U. S. 477)

No. —. John W. DAVIDGE v. Leo SIMMONS. June 1, 1920. Petition for a writ of error in this case to the Court of Appeals of the District of Columbia allowed upon petitioner giving bond in the sum of one thousand dollars.

(253 U. S. 499)

No. 14. The UNITED STATES, appellant, v. The QUAKER OATS COMPANY et al. June 1, 1920. Appeal from the District Court of the United States for the Northern District of Illinois. For opinion below, see 232 Fed. 499. Mr. Assistant Attorney General for the United States. Dismissed, on motion of Mr. Assistant to the Attorney General Ames for the appellant.

(253 U. S. 476)

No. 570. John F. DONAHUE, appellant, v. Helen May DONAHUE, alias Helen May Huskey. June 1, 1920. Appeal from the District Court of the United States for the District of Nevada. Mr. George C. Otto, of Chicago, Ill., for appellant. Mr. H. W. Huskey, of Reno, Nev., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining & Developing Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(253 U. S. 476)

No. 708. J. D. PURCELL et al., plaintiffs in error, v. The CITY OF LEXINGTON on relation of Thomas E. COYNE, back tax assessor. June 1, 1920. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 186 Ky. 381, 216 S. W. 599. Messrs. George C. Webb, George R. Hunt, and James R. Bush, all of Lexington, Ky., for plaintiffs in error. Messrs. Jesse I. Miller, H. E. Ross, and Harry B. Miller, all of Lexington, Ky., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18, 38, 39, 8 Sup. Ct. 741, 31 L. Ed. 607; *Central Land Co. v. Laidley*, 159 U. S. 103, 111, 16 Sup. Ct. 80, 40 L. Ed. 91; *Bacon v. Texas*, 163 U. S. 207, 216, 16 Sup. Ct. 1023, 41 L. Ed. 132; *McCullough v. Virginia*, 172 U. S. 102, 116, 19 Sup. Ct. 134, 43 L. Ed. 382; *Hubert v. New Orleans*, 215 U. S. 170, 175, 30 Sup. Ct. 40, 54 L. Ed. 144; *Missouri & Kansas Interurban Ry. Co. v. Olathe*, 222 U. S. 187, 32 Sup. Ct. 47, 56 L. Ed. 156; (2) *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining & Developing Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(253 U. S. 490)

No. 839. G. W. BOULDIN, petitioner, v. The UNITED STATES of America. June 1, 1920. For opinion below, see 261 Fed. 674. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 490)

No. 851. NATIONAL SURETY COMPANY, petitioner, v. LEFLORE COUNTY, IN THE STATE OF MISSISSIPPI. June 1, 1920. For opinion below, see 262 Fed. 325. Mr. Jno. R. Tyson, of Montgomery, Ala., for petitioner. Mr. R. C. McBee, of Greenwood, Miss. (Messrs. Gardner, McBee & Gardner, of Greenwood, Miss., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 862. Hannah T. WILLSON, plaintiff in error, v. Curtis C. McDONNELL. June 1, 1920. Motion to dismiss denied.



(253 U. S. 490)

No. 863. Samuel L. SNEIERSON, petitioner, v. The UNITED STATES of America. June 1, 1920. For opinion below, see 264 Fed. 268. Messrs. Wm. Shaw McCallum, David Stoneman, and Wm. H. Garland, all of Boston, Mass., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Franklin G. Wixson, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 481)

No. 871. Henry ALBERS, petitioner, v. The UNITED STATES of America. June 1, 1920. For opinion below, see 263 Fed. 27. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(253 U. S. 490)

No. 872. H. M. WHEELER, petitioner, v. Charles P. TAFT and H. W. Inscore. June 1, 1920. For opinion below, see 261 Fed. 978. Mr. G. P. Bullis, of Vidalia, La., for petitioner. Mr. Henry J. Livingston, of Memphis, Tenn. (Messrs. McGehee, Livingston and Farabough, of Memphis, Tenn., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 491)

No. 880. F. H. ORCUTT & SON COMPANY et al., petitioners, v. NATIONAL TRUST & CREDIT COMPANY. June 1, 1920. For opinion below, see 265 Fed. 267. Messrs. Harrison Musgrave and William S. Oppenheim, both of Chicago, Ill., for petitioners. Messrs. James W. Hyde, John W. Creekmur, and Donald J. De Wolfe, all of Chicago, Ill., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(253 U. S. 491)

No. 885. The CHESAPEAKE STEAMSHIP COMPANY of BALTIMORE CITY, owner, etc., et al., petitioners, v. Frank HAND, master, etc. June 1, 1920. For opinion below, see 266 Fed. 641. Messrs. Hughes, Vandeventer & Eggleston, of Norfolk, Va. (Mr. Floyd Hughes, of Norfolk, Va., of counsel), for petitioners. Messrs. Hughes, Little & Sewaell, of Norfolk, Va. (Mr. R. M. Hughes, of Norfolk, Va., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 490)

No. 889. The DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, petitioner, v. Charles S. CANDEE, Jr. June 1, 1920. For opinion below, see 109 Atl. 202. Mr. Frederic B. Scott, of New York City, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New Jersey denied.

(253 U. S. 491)

No. 891. Anthony PHILLIPS, petitioner, v. The UNITED STATES of America. June 1, 1920. For opinion below, see 264 Fed. 657. Mr. Frederick T. Saussy, of Savannah, Ga., for

petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Franklin G. Wixson, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 491)

No. 898. Hiram N. STANCIL et al., petitioners, v. FREDERICK LEYLAND & COMPANY, Limited, claimant, etc., et al. June 1, 1920. For opinion below, see 264 Fed. 511. Messrs. John D. Grace and M. A. Grace, both of New Orleans, La., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 481)

No. 900. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. Amy SMITH. June 1, 1920. For opinion below, see 110 Atl. 142. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted.

(253 U. S. 491)

No. 907. Arnold Jacob UHL, petitioner, v. The UNITED STATES of America. June 1, 1920. For opinion below, see 263 Fed. 79. Mr. William Augustus Denson, of Birmingham, Ala., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 492)

No. 914. CURACAO TRADING COMPANY (Curacaosche Handel Mattschappij), petitioner, v. Carl BJORGE, master and claimant, etc., et al. June 1, 1920. For opinion below, see 263 Fed. 693. Messrs. J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for petitioner. Messrs. Terriberry, Rice & Young, of New Orleans, La. (Mr. W. W. Young, of New Orleans, La., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 482)

No. 916. FEDERAL TRADE COMMISSION, petitioner, v. BEECH-NUT PACKING COMPANY. June 1, 1920. For opinion below, see 264 Fed. 885. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 938. SOUTHERN PACIFIC RAILROAD COMPANY, appellant, v. Franklin K. LANE, Secretary of the Interior, et al. June 1, 1920. See, also, 263 Fed. 637. Mr. A. A. Hoehling, Jr., of Washington, D. C., for the motion. Substitution of John Barton Payne, present Secretary of the Interior, in the place of Franklin K. Lane, former Secretary of the Interior, as a party appellee, ordered on motion of Mr. A. A. Hoehling in that behalf.

No. —, Original. Ex parte in the matter of CHICAGO ROCK ISLAND & PACIFIC RAILWAY COMPANY, petitioner. June 7,

1920. Motion for leave to file petition for a writ of prohibition or mandamus granted, and a rule to show cause awarded returnable Monday, October 4 next.

No. 7, Original. The STATE OF ARKANSAS, complainant, v. The STATE OF MISSISSIPPI. June 7, 1920. See, also, 252 U. S. 344, 40 Sup. Ct. 333, 64 L. Ed. 605. Messrs. Walter P. Armstrong and J. M. Moore, of Little Rock, Ark., and Herbert Pope, of Chicago, Ill., for complainant. Messrs. Garner W. Green, of Jackson, Miss., Gerald Fitz Gerald, of Clarksdale, Miss., and Ross A. Collins, of Jackson, Miss., for respondent. Motion to stay further proceedings in this cause denied.

(253 U. S. 477)

No. 22, Original. The STATE OF GEORGIA, complainant, v. The STATE OF SOUTH CAROLINA. June 7, 1920. See, also, 39 Sup. Ct. 258, 64 L. Ed. —. Mr. Clifford Walker, of Monroe, Ga., for complainant. Messrs. A. M. Lumpkin, of Columbia, S. C., and Sam M. Wolfe, Atty. Gen., for respondent. Motion for the appointment of a special master to take such testimony as may be necessary and to receive in evidence such exhibits as may be offered by the parties hereto, granted, and, on the suggestion of counsel for both parties, Mr. Charles S. Douglas, of Washington, D. C., appointed as such special master and directed to report the testimony and exhibits to the court without conclusions of law or findings of fact.

(253 U. S. 473)

No. 3. The UNITED STATES of America, appellant, v. READING COMPANY et al.; and

No. 4. READING COMPANY et al., appellants, v. The UNITED STATES of America. June 7, 1920. For former opinion, see 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. —. The Attorney General, for the United States. Messrs. Henry S. Drinker, Jr., Charles Heebner, Abraham M. Beitler and William Jay Turner, all of Philadelphia, Pa., and Jackson E. Reynolds, of New York City, and William Clarke Mason, of Philadelphia, Pa., for respondents. Motions to modify the decree in these cases denied.

No. 27, Original. The STATE OF OKLAHOMA, complainant, v. THE STATE OF TEXAS. June 7, 1920. See, also, 40 Sup. Ct. 585, 64 L. Ed. —. Messrs. W. A. Ledbetter and H. L. Stuart, both of Oklahoma City, Okl., for complainant. Ordered that this cause be set down for hearing on the 15th day of November, 1920, upon certain questions, and that the parties be permitted to take and present testimony, and Ernest Knaebel, Esq., of the District of Columbia, appointed commissioner to take said evidence and report the same to the court without findings or conclusions.

No. 27, Original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. June 7, 1920. See, also, 40 Sup. Ct. 585, 64 L. Ed. —. Messrs. W. A. Ledbetter and H. L. Stuart, both of Oklahoma City, Okl.,

for complainant. Leave granted to file intervening petitions on behalf of Judsonia Developing Association, the Burke Divide Oil Company Nos. 2 and 3, and Mellish Consolidated Placer Oil Mining Association; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920.

No. 298. UNION PACIFIC RAILROAD COMPANY et al., plaintiffs in error, v. W. H. JENKINS et al. June 7, 1920. See, also, 252 U. S. 589, 40 Sup. Ct. 393, 64 L. Ed. —. Messrs. Charles H. Sloan, of Geneva, Neb., and William E. Flynn, of No. Platte, Neb., for plaintiffs in error. Motion to vacate the judgment of dismissal and restore this cause to the docket denied.

No. 411. Morris ZUCKER, plaintiff in error, v. The UNITED STATES of America. June 7, 1920. Mr. Louis B. Boudin, of New York City, for plaintiff in error. The Attorney General, for the United States. Motion to vacate the stay order in this cause granted.

No. 489. SILVER KING COALITION MINES COMPANY, petitioner, v. CONKLING MINING COMPANY. June 7, 1920. See, also, 250 U. S. 655, 40 Sup. Ct. 13, 63 L. Ed. 1192. Messrs. Curtis H. Lindley, of San Francisco, Cal., W. H. Dickson, A. C. Ellis, Jr., and Thomas Marioneaux, all of Salt Lake City, Utah, for petitioner. Motion to vacate the order allowing a writ of certiorari in this case denied.

(253 U. S. 492)

No. 730. BOSTON WEST AFRICA TRADING COMPANY, petitioner, v. QUAKER CITY MOROCCO COMPANY. June 7, 1920. For opinion below, see 261 Fed. 665. Messrs. Lee M. Friedman and Friedman & Atherton, all of Boston, Mass., for petitioner. Messrs. William L. Putnam, Joseph B. Jacobs, Putnam, Putnam & Bell, and Jacobs & Jacobs, all of Boston, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 734. The UNITED STATES, appellant, v. L. P. & J. A. SMITH. June 7, 1920. For opinion below, see 54 Ct. Cl. 119. Motion to remand this cause to the Court of Claims for additional findings granted.

(253 U. S. 477)

No. 810. LINCOLN GAS & ELECTRIC LIGHT COMPANY, appellant, v. The CITY OF LINCOLN et al. June 7, 1920. Appeal from the District Court of the United States for the District of Nebraska. Messrs. Charles A. Frueauff, of New York City, Max V. Beghtol, of Lincoln, Neb., and Frueauff, Robinson & Sloan of New York City (Mr. Robert Burns, of New York City, of counsel), for appellant. Mr. C. Petrus Peterson, of Lincoln, Neb., for appellees.



PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Heike v. United States*, 217 U. S. 423, 429, 30 Sup. Ct. 539, 54 L. Ed. 821; *United States v. Beatty*, 232 U. S. 463, 466, 34 Sup. Ct. 392, 58 L. Ed. 686; *Rexford v. Brunswick-Balke Collander Co.*, 228 U. S. 339, 346, 33 Sup. Ct. 515, 57 L. Ed. 864; and see *Eichel v. U. S. Fidelity & Guaranty Co.*, 239 U. S. 629, 36 Sup. Ct. 165, 60 L. Ed. 475.

(253 U. S. 492)

No. 854. R. L. MAYFIELD, petitioner, v. The STATE OF TENNESSEE ex rel. F. M. GERARD. June 7, 1920. Mr. R. L. Mayfield, (Mr. James A. Cobb, of Washington, D. C., of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(253 U. S. 492)

No. 874. Fred B. SULLIVAN, petitioner, v. P. SANFORD ROSS, Inc. June 7, 1920. For opinion below, see 263 Fed. 348. Mr. Henry J. Bigham, of New York City, for petitioner. Mr. A. Leo Everett, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 493)

No. 882. Angel VARGAS, petitioner, v. F. M. YAPTICO & COMPANY. June 7, 1920. Mr. Ernest Wilkinson, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(253 U. S. 493)

No. 884. Harmon P. MacKNIGHT, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 263 Fed. 832. See, also, 251 U. S. 543, 40 Sup. Ct. 180, 64 L. Ed. —. Mr. Harmon P. MacKnight, of East Cambridge, Mass., in Pro. Per. for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(253 U. S. 493)

No. 893. MISSOURI PACIFIC RAILROAD COMPANY, petitioner, v. R. L. BLOCK. June 7, 1920. For opinion below, see 218 S. W. 682. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(253 U. S. 493)

No. 894. George W. CANFIELD et al., petitioners v. Lusanna BRINK. June 7, 1920. For opinion below, see 187 Pac. 223. Messrs. John Devereux, Bird McGuire and Chas. W. Grimes, all of Tulsa, Okl., (Mr. William J. Hughes, of Washington, D. C. of counsel), for petitioners. Messrs. D. A. McDougal, W. V. Pryor and C. B. Rockwood, all of Sapulpa, Okl., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(253 U. S. 493)

No. 895. George W. CANFIELD et al., petitioners, v. Ira E. CORNELIUS et al. June 7, 1920. For opinion below, see 188 Pac. 1040. Messrs. John Devereux, Bird McGuire and Chas. W. Grimes, all of Tulsa, Okl. (Mr. William J. Hughes, of Washington, D. C., of counsel), for petitioners. Messrs. D. A. McDougal, W. V. Pryor, and C. B. Rockwood, all of Sapulpa, Okl., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(253 U. S. 494)

No. 902. C. B. SCHOBBERG, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 1. Messrs. Sherman T. McPherson, of Cincinnati, Ohio and O. M. Rogers, of Covington, Ky., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. William C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 494)

No. 903. Henry KRUSE, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 1. Messrs. Sherman T. McPherson, of Cincinnati, Ohio, and O. M. Rogers, of Covington, Ky., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. William C. Herron, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 494)

No. 904. Henry FELTMAN, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 1. Messrs. Sherman T. McPherson, of Cincinnati, Ohio, and O. M. Rogers, of Covington, Ky., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. William C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 494)

No. 905. Peter WIMMER, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 11. Mr. Frederick W. Schmitz, of Covington, Ky., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 494)

No. 908. The FIDELITY & CASUALTY COMPANY OF NEW YORK, petitioner, v. Wallace L. SCHAMBS, trustee in bankruptcy for the estate of Hudson D. Fowler. June 7, 1920. For opinion below, see 263 Fed. 895. Messrs. H. Melvin Roberts, of Cleveland, Ohio, and J. Wilmer Latimer, of Washington, D. C., for petitioner. Messrs. Newton D. Baker and Payer, Winch, Minshall & Karch, all of Cleveland, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 495)

No. 912. Joseph BIVENS, Sr., petitioner, v. UNITED TIMBER CORPORATION. June 7, 1920. For opinion below, see 264 Fed. 308. Messrs. Julian Mitchell, of Charleston, S. C., Thomas M. Boulware, of Barnwell, S. C., and Charles A. Douglas and Hugh H. Obear, both of Washington, D. C., for petitioner. Messrs. Legare Walker, of Summerville, S. C., and L. D. Lide, of Marion, S. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 495)

No. 913. Joseph BIVENS, Sr., petitioner, v. UNITED TIMBER CORPORATION. June 7, 1920. For opinion below, see 264 Fed. 308. Messrs. Julian Mitchell, of Charleston, S. C., Thomas M. Boulware, of Barnwell, S. C., and Charles A. Douglas and Hugh H. Obear, both of Washington, D. C., for petitioner. Messrs. Legare Walker, of Summerville, S. C., and L. D. Lide, of Marion, S. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 495)

No. 919. Orville ANDERSON, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 75. Messrs. Joe Kirby, Joe H. Kirby and Thos. H. Kirby, all of Sioux Falls, S. D. for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(253 U. S. 495)

No. 925. Day AMMERMAN, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 262 Fed. 124. Mr. Robert S. Morrison, of Denver, Colo., (Messrs. O. N. Hilton, of Denver, Colo., John E. Kelley and Caesar A. Roberts and Leslie M. Roberts, both of Denver, Colo., of counsel), for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Raymond S. Norris, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(253 U. S. 482)

No. 926. EUGENE SOL LOUIE, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 264 Fed. 295. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(253 U. S. 496)

No. 928. COMMERCIAL CREDIT COMPANY, petitioner, v. SPONGE EXCHANGE BANK OF TARPON SPRINGS. June 7, 1920. For opinion below, see 263 Fed. 20. Messrs. M. B. Macfarlane, and N. B. K. Pettingill, both of Tampa, Fla. (Mr. Leo Oppenheimer, of New York City, of counsel), for plaintiff. Mr. James F. Glen, of Tampa, Fla., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(253 U. S. 482)

No. 932. JOHN SIMMONS COMPANY, petitioner, v. The GRIER BROTHERS COMPANY. June 7, 1920. For opinion below, see 265 Fed. 481. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(253 U. S. 496)

No. 940. John WHITE, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 263 Fed. 17. Mr. G. F. Eshenroder, of Sandusky, Ohio, for petitioner. Mr. Robert P. Stewart, Assistant Attorney General, and Mr. W. C. Herron, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(253 U. S. 496)

No. 942. AETNA LIFE INSURANCE COMPANY, petitioner, v. Walter N. BRAND. June 7, 1920. For opinion below, see 265 Fed. 6. Messrs. Stewart F. Hancock and William H. Foster, both of Syracuse, N. Y., for petitioner. Messrs. Louis L. Waters and David F. Costello, both of Syracuse, N. Y. for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 496)

No. 945. W. B. TREDWELL, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 266 Fed. 350. Messrs. H. L. Lowry and Harry K. Wolcott, both of Norfolk, Va., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 496)

No. 946. Mary L. Greer CONKLIN, appellant, v. The AUGUSTA CHRONICLE PUBLISHING COMPANY. June 7, 1920. Mary L. Greer Conklin, of Augusta, Ga., in pro. per. Petition for a writ of certiorari herein denied.

(253 U. S. 497)

No. 947. George E. VANDENBURGH, petitioner, v. ELECTRIC WELDING COMPANY. June 7, 1920. For opinion below, see 263 Fed. 95. Messrs. E. A. Lawrence, of Pittsburgh, Pa., and Carlos P. Griffin, of San Francisco, Cal., for petitioner. Mr. Frederick W. Winter, of Pittsburgh, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(253 U. S. 497)

No. 949. G. SANDAA, Master and Claimant, etc., et al., petitioners, v. The UNITED STATES of America et al. June 7, 1920. For opinion below, see 265 Fed. 921. Messrs. Henry H. Little and Leon T. Seawell, both of Norfolk, Va. (Messrs. Hughes, Little & Seawell, of Norfolk, Va., of counsel) for petitioners. Mr. Thomas J. Spellacy, Asst. Atty. Gen. and Messrs. J. Frank Staley and James W. Ryan, Special Assts. Atty. Gen. for respondents.



Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(253 U. S. 497)

No. 957. PECK, STOW & WILCOX COMPANY, petitioner, v. The H. D. SMITH & COMPANY. June 7, 1920. For opinion below, see 262 Fed. 415. Messrs. Frederick P. Fish, of Boston, Mass., and Harrie E. Hart, of Hartford, Conn., for petitioner. Messrs. Archibald Cox, of New York City, and Henry E. Rockwell, of New Haven, Conn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 497)

No. 959. Thomas PENNACCHIO, petitioner, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 263 Fed. 66. Mr. John B. Golden, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 497)

No. 960. ST. PAUL FIRE & MARINE INSURANCE COMPANY, petitioner, v. HAGEMeyer TRADING COMPANY; and

No. 961. ST. PAUL FIRE & MARINE INSURANCE COMPANY, petitioner, v. Hugo A. THOMSEN et al. June 7, 1920. For opinion below, see 266 Fed. 14. Messrs. D. Roger Englar and Oscar R. Houston, both of New York City, for petitioner. Mr. Van Vechten Veeder, of New York City, for respondents. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 498)

No. 965. ROXFORD KNITTING COMPANY, petitioner, v. MOORE & TIERNEY (Inc.). June 7, 1920. For opinion below, see 265 Fed. 177. Mr. Walter S. Hilborn, of New York City (Mr. David J. Gallert, of New York City, of counsel), for petitioner. Mr. Thos. O'Connor, of Waterford, N. Y., (Mr. George E. O'Connor, of Waterford, N. Y., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(253 U. S. 498)

No. 966. ROXFORD KNITTING COMPANY, petitioner, v. WILLIAM MOORE KNITTING COMPANY. June 7, 1920. For opinion below, see 265 Fed. 177. Mr. Walter S. Hilborn, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 970. AMERICAN COLUMN & LUMBER COMPANY et al., appellants, v. The UNITED STATES of America. June 7, 1920. For opinion below, see 263 Fed. 147. Motion for an order staying or superseding during the pendency of this appeal of a part of the final decree of the district court herein denied.

(253 U. S. 498)

No. 971. Pete MORGAN, petitioner, v. The STATE OF LOUISIANA. June 7, 1920. For opinion below, see 84 South. 589. Messrs. R. E. Milling, of New Orleans, La., Allan Sholars, of Monroe, La., W. J. Hammon, of Jonesboro, La., and J. B. Roberts, of Colfax, La., for petitioner. Petition for writ of certiorari to the Supreme Court of the State of Louisiana denied.

(253 U. S. 350)

No. 29. Original, STATE OF RHODE ISLAND v. A. Mitchell PALMER, Atty. Gen., et al.

No. 30. Original. STATE OF NEW JERSEY v. A. Mitchell PALMER, Atty. Gen., et al.

No. 696. George C. DEMPSEY v. Thomas J. BOYNTON, U. S. Atty., et al.

No. 752. KENTUCKY DISTILLERIES & WAREHOUSE CO. v. W. V. GREGORY, U. S. Atty., et al.

No. 788. Christian FEIGENSPAN v. Joseph I. BODINE, U. S. Atty., et al.

No. 794. Hiram A. SAWYER, U. S. Atty., et al. v. MANITOWOC PRODUCTS CO.

No. 837. ST. LOUIS BREWING ASS'N v. George H. MOORE, Collector, et al.

June 7, 1920.

Dissenting opinion.

For majority opinion, see 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. —.

\*407

\*Mr. Justice CLARKE (dissenting). I concur in the first seven paragraphs and in the tenth paragraph of the announced "Conclusions" of the Court, but I dissent from the remaining three paragraphs.

The eighth, ninth and eleventh paragraphs, taken together, in effect, declare the Volstead Act (41 Stat. 305) to be the supreme law of the land—paramount to any state law with which it may conflict in any respect.

Such a result, in my judgment, can be arrived at only by reading out of the second section of the Eighteenth Amendment to the Constitution the word "concurrent," as it is used in the grant to Congress and the several states of "concurrent power to enforce this article by appropriate legislation." This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this Court—that in expounding the Constitution of the United States no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word to the extent that this is reasonably possible.

This rule was first announced in 1824 in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23;

it was applied with emphasis in 1840 in *Holmes v. Jennison*, 14 Pet. 540, 570, 10 L. Ed. 579; and in the recent case of *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, it is referred to as an elementary canon of constitutional construction.

The authoritative dictionaries, general and law, and the decided cases, agree, that "concurrent" means "joint and equal authority," "running together, having the same authority," and therefore the grant of concurrent power to the Congress and the states should

\*408

give to each equal, the same, \*authority to enforce the Amendment by appropriate legislation. But the conclusions of the Court from which I dissent, by rendering the Volstead Act of Congress paramount to state laws, necessarily deprive the states of all power to enact legislation in conflict with it, and construe the Amendment precisely as if the word "concurrent" were not in it. The power of Congress is rendered as supreme as if the grant to enforce the Amendment had been to it alone, as it is in the Thirteenth, Fourteenth and Fifteenth Amendments and as it was in one proposed form of the Eighteenth Amendment which was rejected by Congress (Cong. Rec. July 30, 1917, p. 5548, and December 17, 1917, p. 469).

Such a construction should not be given the Amendment if it can reasonably be avoided, as it very clearly may be, I think, with a resultant giving of a large and beneficent effect to the grant, as it is written. Giving to the word "concurrent" its usual and authoritative meaning would result in congressional legislation under this grant of power being effective within the boundaries of any state only when concurred in by action of Congress and of such state, which, however, could readily be accomplished by the approval by either of the legislation of the other or by the adoption of identical legislation by both. Such legislation would be concurrent in fact and in law, and could be enforced by the courts and officers of either the nation or the state, thereby insuring a more general and satisfactory observance of it than could possibly be obtained by the federal authorities alone. It would, to a great extent, relieve Congress of the burden and the general government of the odium to be derived from the antagonism which would certainly spring from enforcing within states federal laws which must touch the daily life of the people very intimately and often very irritatingly.

\*409

\*Such co-operation in legislation is not unfamiliar to our Constitution or in our practical experience.

By section 10 of article 1 of the Constitution of the United States the states are deprived of power to do many things without the consent of Congress, and that consent has frequently been given, especially to con-

tracts and agreements between states, which without it would be unconstitutional and void. The Wilson Act of 1890 (Comp. St. § 8738), the Webb-Kenyon Act of 1913 (Comp. St. § 8739), and the Reed Amendment of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a-10387c), are familiar examples of co-operative legislation on the subject of intoxicating liquors. Other instances could readily be supplied. When to this we add that the Volstead Act is obviously in very large part a compilation from the prohibition codes of various states and is supposed to contain what is best in each of them, there is every reason to believe that if concurrent legislation were insisted upon, the act would be promptly approved by the Legislatures of many of the states and would thereby become the concurrent law of the state and nation throughout a large part of the Union.

Under this construction, which I think should be given the Amendment, there would be large scope also for its operation even in states which might refuse to concur in congressional legislation for its enforcement. In my judgment the law in such a state would be as if no special grant of concurrent power for the enforcement of the first section had been made in the second section, but, nevertheless, the first section, prohibiting the manufacture, sale, transportation, importation or exportation, of intoxicating liquors for beverage purposes, would be the supreme law of the land within the nonconcurring states and they would be powerless to license, tax, or otherwise recognize as lawful anything violating that section, so that any state law in form attempting such recognition would be unconstitutional and void. Congress would have full power under the interstate com-

\*410

merce clause, \*and it would be its duty, to prevent the movement of such liquor for beverage purposes into or out of such a state and the plenary police power over the subject, so firmly established in the states before the Eighteenth Amendment was adopted, would continue for use in the restricted field which the first section of the Amendment leaves unoccupied—and the presumption must always be indulged that a state will observe and not defy the requirements of the national Constitution.

Doubtless such a construction as I am proposing would not satisfy the views of extreme advocates of prohibition or of its opponents, but in my judgment it is required by the salutary rule of constitutional construction referred to, the importance of which cannot be overstated. It is intended to prevent courts from rewriting the Constitution in a form in which judges think it should have been written instead of giving effect to the language actually used in it, and very certainly departures from it will return to plague the authors of them. It does not re-



quire the eye of a seer to see contention at the bar of this Court against liberal, paramount, congressional definition of intoxicating liquors as strenuous and determined as that which we have witnessed over the strict definition of the Volstead Act.

With respect to the eleventh conclusion of the Court, it is enough to say that it approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered. This is deemed warranted, I suppose, as legislation appropriate to the enforcement of the first section and precedent is found for it in prohibition legislation by states. But I cannot agree that the prohibition of the manufacture, sale, etc., of intoxicating liquors in the first section of the Eighteenth Amendment gives that plenary power over the subject which the Legislatures of the states derive from the people or which may be derived from the war

<sup>\*411</sup>

powers \*of the Constitution. Believing, as I do, that the scope of the first section cannot constitutionally be enlarged by the language contained in the second section, I dissent from this conclusion of the Court.

In the Slaughterhouse Cases, 16 Wall 36, 21 L. Ed. 394, and other cases, this Court was urged to give a construction to the

Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of our state and federal governments by transferring to the general government that police power, through the exercise of which the people of the various states theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its varieties of climate, of industry and of habits of the people. But this Court, resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government, in a number of decisions which came to command the confidence even of the generation active when they were rendered and which have been regarded by our succeeding generation as sound and wise and highly fortunate for our country.

The cases now before us seem to me to again present questions of like character to, and of not less importance than, those which were presented in those great cases, and I regret profoundly that I cannot share in the disposition which the majority of my Associates think should be made of them.

















COLLEGE OF THE SEQUOIAS  
LIBRARY

Reference

College of Sequoias

LIBRARY



